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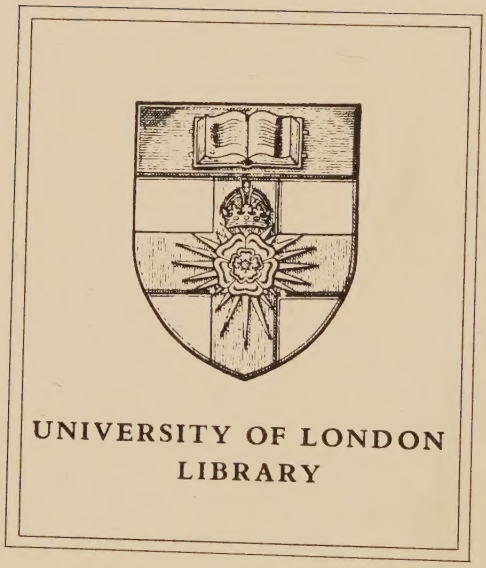

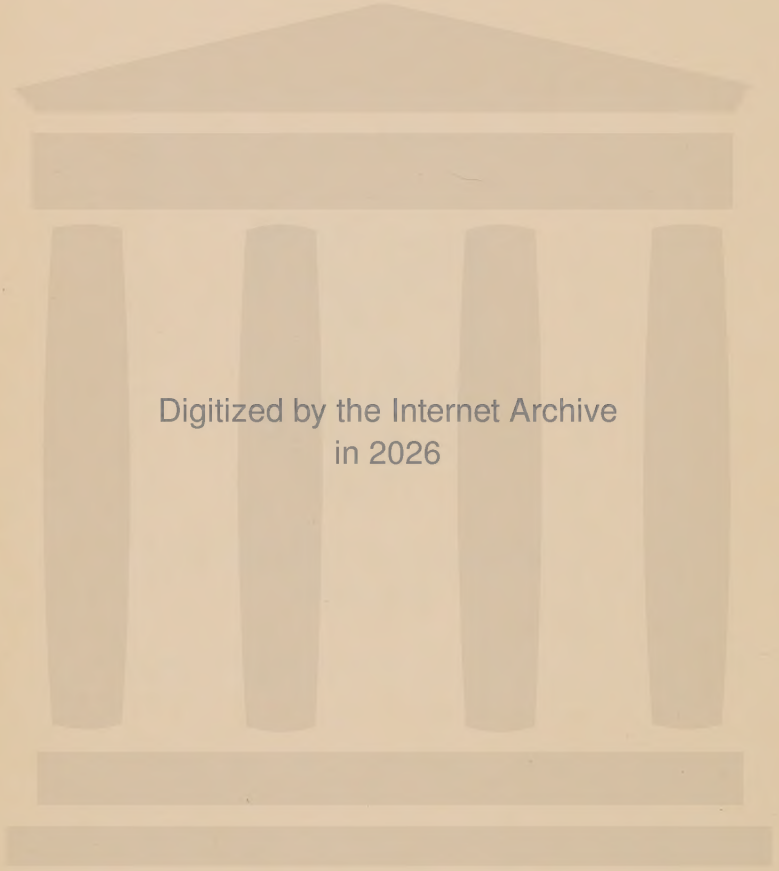
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AND THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

ALSO

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Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

[HOUSE OF LORDS.]

COMMITTEE FOR PRIVILEGES.

THE AYLESFORD PEERAGE.

H. L. (E.)
1885
July 6.

Legitimacy—Paternity of Child born in Wedlock—Evidence—Husband and Wife, Statements by, as to Paternity.

Where the legitimacy of a child born in wedlock is in issue, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct, although she could not be allowed to make such statements in the witness box.

THIS was a petition by the Hon. Charles Wightwick Finch, submitting that he had succeeded to the honours and dignities of Earl of Aylesford and Baron Guernsey, and praying Her Majesty to summon him to Parliament as Earl of Aylesford.

Mr. Finch was the second son of the sixth Earl of Aylesford, and brother of the seventh Earl.

The outline of the case presented by him was as follows:—

The seventh Earl married in 1871 a lady by whom he had only two children (daughters), born in 1872 and 1875 respectively. In the latter part of 1875, while he was absent in India, his wife Edith Lady Aylesford formed an adulterous connection with the

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Marquis of Blandford, now Duke of Marlborough, and went to live with him. After his return from India in 1876 the seventh Earl never cohabited or had any intercourse with his wife. A deed of separation was executed in 1877. In November 1881 Edith Lady Aylesford and Lord Blandford were living together in Paris as man and wife, under the names of Mr. and Mrs. Spencer, and on the 4th of November she gave birth to a son, who was registered in Paris under the names of Guy Bertrand, and as the child of unnamed parents. The seventh Earl never acknowledged this child as his, and died on the 13th of January, 1885, in Texas.

The petition was opposed by Edith Countess of Aylesford (widow of the seventh Earl), as guardian and next friend of her infant son Guy Bertrand, submitting that he was the son of the seventh Earl, and that as such the honours and dignities of the Earl of Aylesford and Baron Guernsey had devolved on and were now vested in him, and praying their Lordships to report that Mr. Finch had not made out his claim.

The case was heard before the Committee for Privileges July 1, 2, 1885.

Charles Russell Q.C. *Edward Macnaghten* Q.C. *Charles Hall* Q.C. and *H. H. Asquith* appeared for Mr. Finch.

Horace Davey Q.C. *Edward Clarke* Q.C. and *F. H. Jeune* appeared for Edith Lady Aylesford.

Sir *Richard E. Webster* A.G. and *R. S. Wright* appeared for the Crown.

Counsel for Mr. Finch having in support of his case adduced much evidence to which no objection was offered, called as witness Jane, Dowager Countess of Aylesford, widow of the sixth and mother of the seventh Earl, and proposed to put in letters written to the witness by Edith Lady Aylesford in or about March, 1876.

Edward Clarke Q.C. on behalf of Edith Lady Aylesford, before the letters were read, objected to their reception on the ground that if they bore upon the question of legitimacy they

were inadmissible, according to the well known rule that the evidence of the father or the mother as to legitimacy was inadmissible; and that if the letters contained no reference to that subject they were irrelevant.

[LORD BLACKBURN:—Has it not always been considered that when a woman leaves her husband's house, whether she is turned out or goes voluntarily, her own declarations at the time are part of the res gestæ and admissible, not as conclusive proof but as evidence of adultery?

LORD BRAMWELL:—Are not the letters admissible as part of the entire course of conduct?]

Edward Clarke Q.C. submitted that letters written in 1876 could have no relevancy to the legitimacy of a child born in 1881.

EARL OF SELBORNE:—

My Lords, I think it is quite clear that these letters are evidence. They are important facts in the history of the conduct of the parties. The authority of *Morris* v. *Davies* (1) and other cases shews that upon an inquiry of this kind evidence of conduct is admissible, whatever may be its weight.

LORDS BLACKBURN, BRAMWELL, and FITZGERALD concurred.

The two following letters were then put in and read:—

Friday Night.

"Dear Lady Aylesford,—By the time this letter reaches you I shall have left my home for ever. Guernsey knows of this, which will account for his telegram to you. I do not attempt to say a word in self defence, but you can imagine I must have suffered much before I could have taken such a step, *how* much it would be impossible to tell you, but it is the only reparation I can make to Guernsey, and he will now have the opportunity of getting rid of one who he has long ceased to care for.

"You do not know, and you never can know, how hard I have tried to win his love, and without success, and I cannot live uncared for. I do not ask you to think kindly of me, I know

(1) 5 Cl. & F. 163.

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you could not do it, but for God's sake be kind to the children, and do not teach them to hate their wretched mother, let them think I am dead, it will be best. I heard from Minna the other day, but never answered her letter, she will now know why.

"You have always been most kind to me, and it is the last word I shall ever say to you, do not be offended if I thank you for all your kindness, and tell you how very wretched it makes me to think that I should have brought such sorrow and disgrace upon you all, and oh! Lady Aylesford, if it is possible, try and forgive me as you hope for forgiveness. I know that Guernsey does not care for me, therefore, I do not think he will feel my loss, and perhaps may be glad to be free, but what it costs me to leave my children I cannot tell you, and I cannot bear to think. That they will be well cared for I know, as you will be a mother to them, but, my God, I shall *never* see them again, it is like being dead and yet alive. I could not give orders about the children; they therefore know nothing, so please to give the necessary orders yourself. I have left the diamonds with James, and as regards the things belonging to me, I have written to him to send them, and they will be forwarded to me. I wrote to Madge to come to me to-day, and I have told her all, as I have told you; she has just returned to town, and I am left alone completely broken-hearted. I bring this letter to town myself. I would have seen you, but feel that perhaps you would rather not see me. God bless you, dear Lady Aylesford, and for the last time farewell, and try not to think too hardly of

"Edith.

"I do hope and beg for Guernsey's sake that you will say nothing about this just at present, and if you take the children please do not let the servants at Packington know for what reason, but let them think they are going to you for a change, as since I have arrived in London I have thought it best not to tell them just at present that I have left for good.

"My sisters and friends think they may patch it up, and I believe have telegraphed to Guernsey to alter his decision, and I am bound by a solemn promise not to leave till his answer arrives, and therefore shall remain quietly in London until it does arrive.

"I do not tell you my address as I feel it could only be painful for us to meet, and I do not suppose for a moment you would wish to see me, but I think you will understand my reasons for not wishing it to be known just at present."

"Dearest Lady Aylesford,—I must write to you for the *last* time to thank you, oh! to thank you *so so* much for your goodness to me. I have not deserved it from you, and I have not been a good daughter-in-law to you, and you have behaved to me like an *angel* upon earth. My own mother could not have been more generous and kind than you have been, and as long as this poor wretched child lives she *never never* will forget the love you have shown her, notwithstanding all she has done. I know *how* sorry you are for me, and *how* little I deserve it, and my God, if it had been *possible* for me to give *him* up, I would have done it, if it had only been for the angelic way you have behaved to me. But darling Lady Aylesford, I cannot tell you how *awfully* I love him, it is the *only* excuse I am able to give you. Say good bye to the Colonel for me. I think he liked me, and will be so sorry for me. I could not see him myself, good byes are so dreadful when it is parting for ever. Dearest Minna, ask her too to forgive me for the disgrace I have brought on her, she knows now why I could not answer her letter. I am going to Wales to-morrow as Blandford cannot break his word, it would only make matters worse. Lord Randolph is very sensible, and knows better than I do what should be done. I send you the dressing case, and enclose the key. The hand looking glass, James has it; it was broken, and I gave it to him to have it mended. I should like darling Hilda to have the dressing case, please. I have asked Guernsey in my letter to have Hilda's picture done some day for me. I think he will not deny me that; you will not, I know, if he should refuse. I shall not send my letter to James until my return. My letter to Guernsey I will send you before I leave. I do not feel able to write it to-night, and now I must wish you my last good bye, and to my dying day shall I bless you for your great goodness and generosity to me; how I reproach myself for not having been a better daughter-in-law to you I cannot tell you. May God keep and bless you will always be the fervent prayer of her who has no longer any right to call you her mother-

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in-law; and if some day Guernsey should marry again may she whom he chooses prove a better daughter-in-law than I have been. Good bye! Good bye to you all.

"Edith.

"I have put in the box with the diamonds the lockets that Guernsey gave me, and I should like them to be divided between the two children, for I feel I cannot take them away, and if anybody has a right to them it should be my children. I have kept one or two things that he gave me. I could not part with quite all, and I do not think he would wish me to do so, if he should I will return *everything*. I enclose you the key of the diamonds, and of a small box in which are three bracelets, also for the children. I have given it to James with their names written outside."

The witness having been asked what took place at an interview between her and Edith Lady Aylesford, held in November, 1884, an objection was made by

Edward Clarke Q.C. on behalf of Edith Lady Aylesford:—

Statements by Lady Aylesford subsequent to the matters really in issue are not admissible. It is true that in *Morris* v. *Davies* (1) evidence of subsequent conduct was given; but so far as appears from the report the evidence received was not objected to when tendered, and no argument was offered in the Court below as to its admissibility. It was therefore all dealt with by the House. But a great deal of that evidence was clearly inadmissible according to rules of law established by decided cases, and among others by *Rex* v. *Inhabitants of Sourton* (2). Evidence as to conduct is no doubt admissible: but statements and conversations are not.

[EARL OF SELBORNE:—What passed at an interview of this kind between the wife and her mother-in-law may be important, and enable us to appreciate the bearing of her conduct. It may be that when we hear what was said we ought not to attend to some parts of it, perhaps not to any part. But I do not think you can stop the question.]

The question was then put, and the witness related what took

(1) 5 Cl. & F. 163. (2) 5 A. & E. 180.

place at the interview as follows:—"She wished to tell me that she had never at any time called the child Lord Guernsey, and that as by English law a woman could not bastardize her own child, therefore she could not answer or had not answered questions about his being called Lord Guernsey put to her at the trial when Guernsey" (her husband) "had accused her of molestation (1). That had it not been known in England, she should have wished the child to remain in Paris, and unnamed; but that as all the world knew it she thought she might have the pleasure of her child in England."

Edward Clarke Q.C. on behalf of Edith Lady Aylesford, submitted that these statements were not admissible.

Their Lordships ruled that they were admissible, valeant quantum.

Mrs. Brittain, who attended Lady Aylesford when the child was born, and in whose charge it was left in Paris, was called as a witness, and produced two letters written to her by Lady Aylesford, and one by Lord Blandford. These were objected to by

Horace Davey Q.C. on behalf of Edith Lady Aylesford:—

These letters are said to contain statements as to the legitimacy of the child. It is clear upon the authorities that the mother not only could not be called to state the fact who the father of the child was, but could not be asked any collateral questions tending to prove or disprove that fact, for the rule extends equally to such collateral questions. Her statements or declarations are therefore equally inadmissible for the purpose of bastardizing the child. The rule is clearly laid down in *Rex* v. *Inhabitants of Sourton* (2), where it was held that neither husband nor wife can be examined for the purpose of proving non-access during marriage, nor as to any collateral fact for the purpose of proving non-access.

[EARL OF SELBORNE:—Why are not the letters admissible as part of the res gestæ?]

If the letters are admitted as evidence at all they will be used

(1) Referring to the action of *Fearon* v. *Earl of Aylesford*, 12 Q. B. D. 539.
(2) 5 A. & E. 180.

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for all purposes, and especially for the very purpose for which they are not admissible.

[LORD BRAMWELL:—The rule excluding husband and wife is said to be based on the ground of public policy. But does that extend to evidence of what the husband or wife had previously done? And does the rule exist now that by Act of Parliament husband and wife are admissible witnesses in divorce suits?]

That Act, the Evidence Further Amendment Act 1869 (32 & 33 Vict. c. 68), sect. 3, applies only "to any proceeding instituted in consequence of adultery;" and it has been held that the Act does not render admissible the evidence of a husband to prove non-access and thereby bastardize his child, in proceedings before justices to compel him to maintain the child: *Guardians of Nottingham Union* v. *Tompkinson* (1). The old rule is therefore still in force; and what cannot be proved directly, à fortiori cannot be proved indirectly. The point was expressly determined by Kindersley V.C. in *Atchley* v. *Sprigg* (2), where he said: "I mean to exclude from consideration all that is hearsay evidence. . . . À fortiori I must reject all declarations said to have been made by" the mother "herself, because she could not be heard as a witness to prove any facts of legitimacy or illegitimacy." The Vice-Chancellor also explained a misapprehension as to the evidence given in *Plowes* v. *Bossey* (3).

[EARL OF SELBORNE:—Have you any authority that letters or documents, which would in themselves be evidence, are inadmissible because they contain statements of this nature?]

Not directly: but the reason of the rule excludes them. The rule is a positive rule of law, and is equally applicable whether the parents are willing or unwilling witnesses, and whether they are called to legitimatize or bastardize the child. There is nothing in *Morris* v. *Davies* (4) which gives any colour to admitting such statements, or letters containing them.

EARL OF SELBORNE:—

My Lords, I am of opinion that these letters ought to be read. The authorities which have been referred to I assume to be still

(1) 4 C. P. D. 343, 348–351.
(2) 33 L. J. (Ch.) 345, 347, 348.
(3) 31 L. J. (Ch.) 681.
(4) 5 Cl. & F. 163.

in force, that is to say, that you could not put into the witness-box Lady Aylesford, or if he were still living, Lord Aylesford, for the purpose of proving who the real father of the child was. But it by no means follows that you cannot prove acts and conduct of the one or the other tending, as part of a series of res gestæ, to throw light upon and to lead to a just conclusion upon a question on which they could not directly be permitted to give evidence.

As to the authorities which have been referred to, *Rex* v. *Inhabitants of Sourton* (1) is a case where the direct evidence of the husband having been received for the purpose of proving non-access, the Court held that it ought to have been rejected. In that authority and in others of the same class there is nothing whatever going to the immediate question with which your Lordships are concerned, namely, the question whether the same principle applies to a letter otherwise admissible, being an act of an important nature done by the mother with reference to the care, custody, and bringing up of her child. There is nothing in that class of authorities which shews that such a letter would not be admissible, because there may be in it important matters tending to the conclusion that the child is or is not legitimate. Of course the same rule will apply, whether it tends to the one or the other conclusion.

But it is said that a declaration bearing directly upon the point, if occurring in such a letter, ought not to be received. I agree that it should not be received as direct evidence of the fact. In *Atchley* v. *Sprigg* (2) the Vice-Chancellor excluded declarations which I understand to have been made, not in the witness-box, but during her life, by the mother who was deceased, and which were offered, I presume, for the purpose of shewing that the child was her child. We know that unless given post litem motam and for a special purpose which might exclude them, the declarations of deceased members of a family (and I am not at all aware that the mother would be excluded) are admissible in evidence for the purpose of proving relationship. Therefore, declarations of that kind by the mother would have been admissible on that principle, if not excluded upon the other principle; and the Vice-

(1) 5 A. & E. 180. (2) 33 L. J. (Ch.) 345.

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Chancellor held that such declarations could not be received for the purpose of proving the legitimacy of the child, which was in controversy; not, as I understand, on the lis mota principle, but on the principle that the mother would not for that purpose have been a competent witness herself, if living. I accede to that, and I think that if in any of these letters there should be found a statement that the child was Lord Aylesford's child, or that it was the child of anybody else, those declarations are not in themselves evidence of the fact one way or the other. But I cannot hold that a letter otherwise admissible, which is an important act of conduct done by the mother, is to be excluded in whole or in part (if it were possible to divide one part from the other) because it may contain such declarations. These declarations are facts as well as statements. It is a fact that for some purpose or other the mother wrote a letter containing such statements at such a time. Your Lordships will not take them as proving the fact; but the fact that the mother did write such a letter, at such a time and for such a purpose, as it appears to me, is a thing which, on the principles which were certainly acted upon in *Morris* v. *Davies* (1) (and which appear to me to be sound principles, and quite consistent with the rule), ought not to be excluded from consideration.

LORD BLACKBURN :—

My Lords, I am of the same opinion. I must first observe that these letters are not and could not be received as being statements by Lady Aylesford in themselves. If Lady Aylesford were ever so admissible a witness for those purposes her letters would not be evidence. She must be called and cross-examined, supposing that she were admissible as a witness. I will assume without deciding it, that neither Lady Aylesford nor Lord Aylesford, if he had been alive, could have been received as an admissible witness in this suit. Does that in the slightest degree prevent the admissibility of these letters, supposing them to be such as I assume at present that they are, that is to say, that they come within the class of evidence of conduct which, as it will be contended, is

(1) 5 Cl. & F. 163.

according to *Morris* v. *Davies* (1) evidence leading to the conclusion that the child was not legitimate, was not the child of the person whom the marriage tie made the husband? Assuming that they would be part of such conduct, can they be rejected because they contain distinct statements which, if Lady Aylesford were an admissible witness and giving the evidence, would be direct and positive evidence upon the subject? I agree entirely with what has just been said by the noble and learned Earl, that those statements would not prove the matter, but I am utterly unable to perceive how they could justify the rejection of the letters if in other respects they are admissible. It is very proper to recollect that we should guard ourselves against the prejudice which a person who was not skilled in the law and trained to consider evidence might very likely take up in consequence of such a statement one way or the other; but I do not think that is any reason at all for rejecting the letters.

LORD BRAMWELL:—

My Lords, I must trouble your Lordships with a few words, because I raised a doubt as to whether the rule of law referred to by Mr. Davey was still in existence. That doubt is removed, not merely by the authorities cited by Mr. Davey, but also by the reason of the thing as put by him, that is to say, that it is a positive rule of law, and that it is not expressly abrogated by statute.

Just one word more as to the admissibility of these letters. As mere declarations by Lady Aylesford, of course they would not be admissible; they are only admissible as part of the conduct—part of the res gestæ; and it seems to me that if Mr. Davey's objection were well founded, he might equally have taken it as to the conduct of the parties in Paris and what Lady Aylesford said should be done with the child. But I think that objection would have been an unfounded one, because whatever reason there is for the parent not giving evidence in the witness-box to bastardize the child, that is a reason that does not apply as to evidence given of the conduct of the parent shewing that the child was a bastard. One may put this case: supposing the question was as to the

(1) 5 Cl. & F. 163.

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legitimacy of a certain child; supposing there was reasonably good evidence given—not conclusive evidence, but good evidence—that the father was away altogether, say in America, while the mother was here in England, during the time within which the child must have been begotten to have been born when it was born; and supposing that in order to corroborate it those who affirmed the illegitimacy of the child proposed to give in evidence that the husband, who upon his return lived with his wife, though she had this child, always treated the child unkindly or distantly, and in his will gave money to his other children but gave none to this child—surely that would be a legitimate piece of evidence; but it would be the conduct of the parent that would be given in evidence for the purpose of bastardizing the child of the wife begotten during marriage. I think, therefore, that upon that principle this evidence is admissible.

LORD FITZGERALD concurred.

The letters were then put in and read.

The first was dated the 5th of April 1882, and was signed "E. Spencer." In it Lady Aylesford gave directions about the child's clothes, and said that "Mr. Spencer" would be going over soon to Paris, and that she should like him to see the child in those clothes.

The next letter was as follows:—

"June 9 1882.
"46, Cadogan Square, S.W.

"Mrs. Brittain,—I enclose you a letter from Lady Aylesford, by which you will see that we think it best if you are going to undertake charge of the child for some little time, to tell you the fact which you did not know before. I beg, though, that you will be so good as to keep this information to yourself.

"Regarding your letter, I have sent it on to Lady Aylesford, and she will, I have no doubt, send you some clothes for the child. I think, however, that for the £80 (eighty pounds) a year paid monthly, as you wish, ordinary clothes should be included, but not medical attendance if required.

"You can write to me here at any time on the subject of the child, and I hope that you will do so every six weeks or so, and

let me know if the child was ill or wanted anything at any time; and the perambulator would certainly be provided for; you might be able to come across one second hand.

"Yours truly,

"Blandford."

"Mrs. Brittain,
"25, Avenue Carnot, Paris."

The letter inclosed was as follows:—

"The Chalet,
"Farnham Royal, Slough.

"Mrs. Brittain,—I am very glad to hear my child is going on so well, and as you will have the care of him for some time longer, I think it best that you should know that his mother's name is Lady Aylesford, and not Mrs. Spencer, as I led you to believe, and Mr. Spencer, whom you have seen, is Lord Blandford, the father of the child. I think it best that you should be made aware of this, although I do not care that you should mention the fact to anyone else. Dr. Herbert of course knows who I am. It will therefore not be necessary to write to me any more under the name of Mrs. Spencer. I will send the little frocks by rail if I do not shortly have an opportunity to send them by hand.

"I remain, yours faithfully,

"E. Aylesford."

"June 4, 1882."

[EARL OF SELBORNE:—According to the opinion which we have expressed, that is evidence that at that time Lady Aylesford and Lord Blandford both concurred in representing to the nurse who had charge of the child that he was Lord Blandford's child.]

Further evidence having been given on behalf of Mr. Finch, *Horace Davey* Q.C. addressed the Committee on behalf of Edith Lady Aylesford, and explained that the reason why the claim was opposed on behalf of the infant was because those who represented the infant thought it right that the evidence should be sifted now while the memories of the witnesses were fresh, so that the infant when he grew up might be satisfied that everything that could be done had been done to protect his interests. He admitted that Mr. Finch's case was a strong one, and called no witnesses.

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EARL OF SELBORNE:—

My Lords, your Lordships will be likely to agree that the reasons which have just been assigned by Mr. Davey for the course which has been taken on the part of those who instructed him are good and sufficient reasons, creditable to the judgment of those who gave the advice, and in no sense whatever otherwise than creditable to those who took it. Your Lordships will also acknowledge, I think with satisfaction, that Mr. Davey in his manner of leaving this case to your Lordships' judgment has not only exercised a sound discretion, but has done what all who know him and his way of conducting all business intrusted to him might have expected from him.

The case itself seems to me to be much too clear to admit of any doubt. The lady left her husband's house during his absence in India, in March 1876. He immediately signified his wish that the daughters who had been born of the marriage should be removed from her custody, which was shortly afterwards done; they passed into the custody of his mother, where they have ever since been, and have not met their own mother again. In May 1877 a regular deed of separation was executed between the parties, by which there were mutual covenants not to interfere with each other. Afterwards, there was a divorce suit, which ended in a verdict affirming the culpability both of the husband and of the wife; and on that ground and on the ground of collusion, which was also proved, no divorce was granted. But it is most clearly proved that from the time of the elopement till after the birth of this child, the mother of the child lived in a state of adultery and constant intercourse with Lord Blandford. The utmost and best evidence which the nature of such a case admits of, has been given both by the servants and by the friends of Lord Aylesford the husband, corroborated by those who were acquainted with the acts and the movements of the mother of the child, to negative (of course no negative can be absolutely proved) the fact of the husband and wife ever having met again; and in the circumstances which I have already mentioned, the probabilities are so far against that meeting that, unless a case of this kind is to be dealt with otherwise than according to the ordinary rules of reason and of probability, I

think the burden of proof would be rather on those who might suggest that they did meet again than on those who suggest the contrary. No doubt they were at the same time, during the critical period when this child might have been conceived, for certain spaces of time at different houses in London; but the lady was at a house where she was receiving the visits of her paramour; the husband was in constant intercourse with friends and constant communication with servants, all of whom would have certainly been likely to know if he had been in the habit of visiting his wife. All of them, as far as a negative can be proved, prove the contrary. So that you have all the evidence which the nature of the case admits of, and all the probabilities of the case, to negative the suggestion that (though it was possible they should meet) they actually did meet.

Under those circumstances, this child is born in Paris, on the 4th of November 1881, and without going into the details of the evidence, it is most clearly proved that at that time the mother of the child was passing under the name of Spencer, a family name of the Marquis of Blandford, who also passed as Mr. Spencer, and visited her and communicated with her practically on the footing of husband and wife, both before and after this child was born. Lord Blandford, with the concurrence of the mother, made all the necessary arrangements for medical attendance upon her at the time of her accouchement and for the care of the child afterwards. The child was registered intentionally as a child whose parents would not be named; and for some time there was a proved intention to conceal the birth, though afterwards it was abandoned when the fact had become known. And Lord Blandford not only concurred in making the arrangements for the child, but paid for the medical attendance upon the mother at the birth, and afterwards forwarded cheques from time to time to the nurse who had the care of the child; and whatever the pecuniary arrangements were, it is perfectly clear that they were his arrangements as well as the arrangements of Lady Aylesford.

I do not dwell upon the fact, which might have been expected under those circumstances, that not only by conduct was the child represented as the child of Lord Blandford when all those

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things were done, but that afterwards, when the true names of the parties came to be disclosed, he was expressly represented as their child. If that representation had been a main ingredient in the proof, and the other facts had not been satisfactory, I should have hesitated to say that it would have been safe to impute any serious weight to that representation. It ought not, I think, even as a part of the res gestæ, to be allowed great weight, otherwise it would put it too much in the power of parties, whatever motives might influence them, to change the course of the succession in families by law, by choosing to impute the birth of a child to the person who was preferred rather than the person whom the law would call his parent.

But this case does not in the least degree depend upon that representation. The whole conduct of the parties from first to last is absolutely inconsistent with any other conclusion than that the child was Lord Blandford's child; and as, on the other hand, everything has been done, which the nature of the case admitted of, to satisfy your Lordships that there was no communication between the husband of the lady and the lady during the time when this child must have been conceived, I think there can be no hesitation in coming to the conclusion, which I move your Lordships to resolve, that the Hon. Charles Wightwick Finch has made out his claim to the Earldom of Aylesford and Barony of Guernsey.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion. I will only observe that in this case no question whatever arises as to those presumptions which follow from the existence of matrimony as to the birth of children whilst the husband and wife are living together. It appears perfectly clear, upon the evidence which has been produced, that after Lord Aylesford's return from India, his wife was separated from him, and was living with Lord Blandford as if she were Lord Blandford's wife at that time—living with him, I mean to say, in a state of cohabitation, and that Lord Aylesford not only executed a deed of separation from his wife, but endeavoured to obtain a divorce. In that endeavour he failed. The marriage tie, therefore, remained undissolved, and he was

still married. But after that attempt to obtain a divorce had failed, whilst Lady Aylesford was living with Lord Blandford (and it is not disputed at all that adultery was committed), I cannot think that any presumption arises that Lord Aylesford had cohabitation with her. It seems to me that to say that such a presumption arises from the mere continuance of the non-dissolution, to call it so, of the matrimonial tie under such circumstances would be putting a presumption of law very, very contrary to that of common sense; and I do not think that any authority goes so far as to say that there should be such a presumption.

But I think also that it is quite a possible thing that Lord Aylesford and Lady Aylesford might under those circumstances have condoned all that had passed and have come together again to live as husband and wife, having condoned their mutual adulteries; but there is not the slightest pretence for saying that they ever did. It is also quite possible that though Lady Aylesford was living with Lord Blandford, Lord Aylesford might have connection with her at that time, just as it is possible that anybody else might have surreptitious connection with her. It might have been shewn that Lord Aylesford had connection with Lady Aylesford at that time. But of this no evidence is given and there is not the slightest probability. The question is whether the quantity of evidence which we have had is not sufficient to rebut the presumption of Lord Aylesford, the husband, being the father of the child. Now as to that, the case of *Morris* v. *Davies* (1), a decision of this House, decides what, upon the balance of authority without that decision, I should have no hesitation in deciding, that such a presumption can be rebutted; and it also shews that it can be rebutted by the conduct of the parties, taking the whole res gestæ, raising a strong and irresistible conclusion that the child born was not the child of the husband, but the child of another. Some of the things in *Morris* v. *Davies* (1) which were admitted in evidence I might have hesitated to admit. Some of the things admitted in *Morris* v. *Davies* (1) might not have conveyed the weight to my mind that they seem to have done to the minds of the judges. But the general law was laid down in *Morris* v.

(1) 5 Cl. & F. 163.

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Davies (1) that conduct of this sort might be sufficient to rebut the presumption of the husband being the father of the child, and I think, without troubling your Lordships by going through it, I may say that the evidence now produced of that kind is far stronger and more convincing than that which was produced and had its effect in *Morris* v. *Davies* (1). Further than that I do not think it in the least degree necessary to go, because I quite agree that the decision of your Lordships should be what has been moved by the noble and learned Earl.

LORD BRAMWELL :—

My Lords, I am entirely of the same opinion, and have very little to say in addition. The position of the husband and wife was this. The wife, under the influence of a strong passion, as it appears by her letters, for Lord Blandford, had left her husband's house to live in a state of adultery with Lord Blandford. The husband, knowing of that, had taken his children from her, had given up all intercourse with her, had entered into a deed of separation by which he and she were to live separate, and had endeavoured to free himself from the marriage that bound them together. Now that being the condition of things,—I cannot say that we are called upon to entertain a doubt, because really Mr. Davey did not ask us, but for your Lordships to entertain a doubt as to the case would be to suppose it possible that this unhappy lady while living in a state of adultery with Lord Blandford, for whom she had this passion, could permit her husband, what one may call her nominal husband, to have sexual intercourse with her, and that he himself, insulted as he must have felt himself to be, whatever his merits may have been otherwise, could have intercourse with her which he knew he was sharing with Lord Blandford. People will commit immoral actions, but they would never, I think, do anything so nauseous as what I have suggested as possible ; and the very feeling, the very passion that caused the immoral action to be done, almost precludes the possibility of such a course of conduct as I have supposed.

(1) 5 Cl. & F. 163.

LORD FITZGERALD:—

My Lords, I entirely concur, and I do not propose to add anything save that the case is so exceedingly clear, both in fact and in law, that I wish to say that the course adopted by Mr. Davey, representing the party opposing this petition, meets with my entire concurrence.

Resolved, that it is the opinion of this Committee that the claimant the Honourable Charles Wightwick Finch has made out his claim to the titles, honours, and dignities of Earl of Aylesford and Baron Guernsey.

The resolution having been reported to the House July 6th it was resolved and adjudged accordingly.

Lords' Journals 6th July 1885.

Solicitors for claimant: *Bennett, Dawson, & Bennett.*

Solicitors for Edith Lady Aylesford: *Collyer-Bristow, Withers, Russell, & Hill.*

[HOUSE OF LORDS (1).]

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THE SOCIÉTÉ GÉNÉRALE DE PARIS AND G. COLLADON . . . . . } APPELLANTS;

AND

JANET WALKER AND OTHERS . . . RESPONDENTS.

Company—Shares—Certificates, Possession of—Transfer—Transfer in Blank—Delivery of Transfer by Transferor as his Deed—Equitable Mortgage of Shares—Notice—Priority—Maxim "Qui prior est tempore potior est jure"—Companies Act 1862 (25 & 26 *Vict. c.* 89), *s.* 30.

M., the holder of shares in a company, deposited with S. certificates of the shares and a blank transfer, as security for a debt. Afterwards he fraudulently executed a blank transfer in respect of the shares and deposited it with the appellants, as security for a debt. On being applied to by the appellants for the share certificate he stated that it was lost or mislaid. The appellants stamped their transfer, filled up the blanks, had it executed by their manager as the transferee, and sent it to the company's office with a request that the company would "certify it," and with an indemnity against any claim in respect of the missing certificates. The company did not accept the indemnity and declined to certify. Shortly after the executors of S. (who had died) gave notice to the company of their charge upon the shares. The company was incorporated under the Companies Act 1862. The articles of association provided that the shares should be transferable only by deed: that lost certificates might be renewed upon satisfactory proof of the loss, or in default of proof upon a satisfactory indemnity being given: and that the company should not be bound by or recognise any equitable interest in shares. Each certificate stated, under the company's seal, that no transfer of any portion of the shares represented by the certificate would be registered until the certificate had been delivered at the company's office. The appellants having brought an action against the executors for a declaration of their title to the shares and to restrain the executors from dealing with the shares:—

Held, affirming the decision of the Court of Appeal, that the transfer to the appellants not having been re-delivered by the transferor after the blanks were filled up was not his deed and that the appellants had no legal title to the shares: that as between themselves and the company they never

(1) The appeals heard in December 1885 were heard in the name of the House of Lords by the Lords of Appeal, sitting in the House of Lords during the dissolution of Parliament by virtue of a writing by Her Majesty the Queen under her sign manual dated the 21st day of November 1885 pursuant to the provisions of the Appellate Jurisdiction Act 1876 (39 & 40 Vict. c. 59 s. 9).

had an absolute and unconditional right to be registered as the shareholders: that nothing that had happened gave them a right on equitable grounds to displace the original priority of the equitable claim of the executors: and that the action could not be maintained.

Hibblewhite v. *McMorine* (6 M. & W. 200) approved.

Held, also, by the Earl of Selborne, that the principle of *Dearle* v. *Hall* (3 Russ. 1), as to the effect of notice in determining the priorities of equitable rights is inapplicable to shares in such a company.

APPEAL from an order of the Court of Appeal.

The following is an outline of the facts which are set out at length in the report of the decision below (1).

James Montgomery Walker, holding 100 shares in the Tramways Union Company Limited, in March 1881 executed a blank transfer and deposited it and the certificates of his shares with James Scott Walker as security for a debt to him. The transfer was not executed by the transferee, and did not contain any name or date or the number or numbers of the shares.

On or about the 15th of December 1882 James Montgomery Walker, being pressed by the appellants for a debt owing to them, executed a blank transfer which by a contemporaneous memorandum he called a "transfer for 100 Tram Unions," and sent it with the memorandum to Colladon, the appellants' manager. This transfer contained the name of the transferor and the date "14th of December 1882," but not the name of any transferee, nor the number or numbers of the shares. Colladon at once applied to James Montgomery Walker for the certificate of the shares and was told by him that it had been lost or mislaid. The appellants were desirous of selling the shares and, for that purpose, of having the transfer put in order. With this object communications passed between Colladon and a clerk in the office of the Tramways Union Company, and between Colladon and James Montgomery Walker, which are set out at length in the judgment of Lord Blackburn. In the result the transfer was stamped, and the blanks were filled up with the name of Colladon as the transferee, and with the number and numbers of the shares, and the transfer was executed by Colladon. In this state it was on the 30th of December 1882 sent by Colladon to the office of the Tramways Union Company with a request to "certify the transfer"

(1) 14 Q. B. D. 424.

H. L. (E.) 1885 SOCIÉTÉ GÉNÉRALE DE PARIS v. WALKER.

and a letter of indemnity against any loss which might arise in the event of the missing certificates being forthcoming at any future time. The company's clerk said that an indemnity by James Montgomery Walker's bankers would be required. This was offered but the clerk refused to "certify the transfer." The appellants contended that what passed between Colladon and James Montgomery Walker before the 30th of December amounted or was equivalent to a redelivery of the transfer deed after the blanks had been filled up, but (as will be seen) the House held that there was no sufficient evidence of this.

On the 4th of January 1883 the respondents, executors of James Scott Walker (who had died in February 1882), gave notice to the company that they were in possession of the share certificates and a transfer signed by J. M. Walker, and warned the company not to allow J. M. Walker to deal with the shares.

The Tramways Union Company was incorporated under the Companies Act 1862. The articles of association material to this report were as follows:—

Article 22. The company shall not be bound by or recognise any equitable, contingent, future, or partial interest in any share, or any other right in respect of a share, except an absolute right thereto in the person from time to time registered as the holder thereof, and except also as regards any parent, guardian, committee, husband, executor or administrator, or trustee in bankruptcy, his right under these presents to become a member in respect of or to transfer a share (1).

VII. TRANSFER OF SHARES.

Article 26. Subject to the exercise by the company of the powers conferred by the Companies Act 1867 of issuing share warrants to bearer and to any regulations of the company in that behalf, shares shall be transferable only by deed executed by the transferor and transferee and duly entered in the register of transfers.

(1) By sect. 30 of the Companies Act 1862 (25 & 26 Vict. c. 89), "No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies under this Act and registered in England or Ireland."

Article 28. The register of transfers shall be kept by the secretary under the control of the board.

Article 32. A person shall not be registered as the transferee of a share until the instrument of transfer duly executed has been left with the secretary to be kept with the records of the company but to be produced at every reasonable request and such transfer fee has been paid as is provided by or in accordance with the last article, but in any case in which in the judgment of the board this article ought not to be insisted on it may be dispensed with.

VIII. SHARE CERTIFICATES.

Article 33. The certificates of shares shall be under the seal and shall be signed by one director and countersigned by the secretary.

Article 35. If any certificate be worn out or lost, it may be renewed on such proof as satisfies the board being adduced to them of its being worn out or lost, or in default of such proofs on such indemnity as the board deem adequate being given, and an entry of the proof or indemnity shall be made in the minutes of their proceedings.

Each certificate was sealed with the company's seal and contained the following:—

NOTE.—No transfer of any portion of the shares represented by this certificate will be registered until the certificate has been delivered at the company's office.

On the 6th of January 1883 the appellants brought the present action against the Tramways Union Company and the executors of James Scott Walker. The action having been stayed as regards the company, the appellants claimed as against the executors a declaration of title to the shares; that the executors should deliver up to the appellants the certificates and the transfer; an injunction to restrain the executors from requiring any registration of or dealing with the shares otherwise than as the appellants should direct.

Lopes, J. (who heard the action without a jury) gave judgment for the plaintiffs. The Court of Appeal (Brett M.R., Cotton and

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Lindley LJJ.) reversed this decision and entered judgment for the defendants.

From this decision the plaintiffs appealed.

Dec. 8, 9. *Finlay* Q.C. and *J. M. Solomon* for the appellants:—

The appellants' claim is based first on legal, and secondly on equitable grounds. The true view of the facts is that J. M. Walker executed the completed transfer to the appellants as a deed, or (at all events) that what passed amounted to a redelivery after the blanks had been filled in. This gave the appellants the legal ownership of the shares, or at least the legal right to be registered as owners of the shares for valuable consideration without notice of the respondents' claim. It is true that Lord Mansfield's decision in *Texira* v. *Evans* cited in *Master* v. *Miller* (1) was overruled or doubted in *Hibblewhite* v. *McMorine* (2), where it was held that a blank transfer of shares did not operate as a deed. But what passed in the present case after the blanks were filled in amounted to a redelivery. A manual redelivery of a deed is not necessary: Shepp. Touch. p. 57: *Hudson* v. *Revett* (3), recognised in *Tupper* v. *Foulkes* (4). See also *Goodright* v. *Straphan* (5). Assuming that there was an execution of the transfer, the observations of Wood V.C. in *Dodds* v. *Hills* (6) apply. The legal right to demand a transfer is equivalent to a legal title. The offer to give an adequate indemnity bound the company to dispense with the production of the certificates and to register.

Further, even if the appellants had no legal title to be registered they had an equitable title to the shares; and if their title is only equitable their equity is better than the respondents'. There being a valid contract on good consideration by J. M. Walker to transfer, the appellants had a valid equitable title to the shares. To give notice of an equitable title all that is necessary is to tell the company that the claimant has an equitable title—as was done here. It is not necessary to describe the nature of the title. The true meaning of the rule "qui prior est

(1) 1 Anst. 228.
(2) 6 M. & W. 200, 215.
(3) 5 Bing. 368, 388, 389.
(4) 30 L. J. (C.P.) 214.
(5) 1 Cowp. 201.
(6) 2 H. & M. 424.

tempore potior est jure" is given by Kindersley V.C. in *Rice* v. *Rice*. (1) The executors of James Scott Walker intentionally abstained from perfecting their title and enforcing their security and taking any steps which would have prevented J. M. Walker from dealing with the shares, in order that he might remain a director. The appellants on the other hand did all they could to have their title registered, and have therefore a better equitable title than the respondents, by reason of their superior diligence. The respondents do not now (as they did before Lopes J.) allege that the executors of J. S. Walker at the funeral or otherwise gave notice of their claim to the company. What took place on or about the 28th of December was good notice of a beneficial title in the appellants.

[LORD BLACKBURN:—Was it anything more than notice that J. M. Walker was trying to transfer?]

Primâ facie it must be taken—being a transfer to a commercial company—to be a transfer for value. The letter of indemnity given by the appellants dispels any idea that Colladon was acting otherwise than as trustee for the appellants. The notice was a valid notice that the appellants claimed to be entitled to the shares as beneficiaries, and it was assumed to be a good notice by all the judges below. The dicta of Lord Cottenham in *Mangles* v. *Dixon* (2) remain untouched, though the decision was afterwards overruled (3). See also on this point, *Etty* v. *Bridges* (4) per Knight Bruce V.C. and the cases there referred to. The doctrine that a second incumbrancer who gives notice takes priority over an earlier incumbrancer who does not give notice, was first applied in the case of debts: *Ryall* v. *Rowles* (5). Giving notice to the company was equivalent to taking possession: *Dearle* v. *Hall* (6).

[LORD FITZGERALD referred to *Dunster* v. *Lord Glengall* (7) in 1853.]

Dearle v. *Hall* (6) was summarised and explained by Lord

(1) 2 Drew. 73, 77.
(2) 1 Mac. & G. 437, 446.
(3) 3 H. L. C. 702.
(4) 2 Y. & C. Ch. 486, 492.
(5) 1 Ves. Sen. 348; 2 W. & T. L. C. 5th ed. 729.
(6) 3 Russ. 1.
(7) 3 Ir. Ch. 47, 51, 52.

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Lyndhurst in *Foster* v. *Cockerell* (1). If J. Montgomery Walker had become bankrupt the title of the appellants would have prevailed over the assignee's. The shares would not have been in the order and disposition of the bankrupt: *Ex parte Littledale* (2); *Ex parte Boulton* (3), per Turner LJ.; and see *Ex parte Union Bank of Manchester* (4) per Bacon V.C.

[LORD FITZGERALD referred to *In re Hennessy* (5).

The reasoning upon which it has been held that notice to the company takes shares out of the order and disposition of a bankrupt applies equally to the case of successive incumbrances. It may be noted in passing that the question whether a share in an incorporated company is a chose in action was discussed in *Colonial Bank* v. *Whinney* (6), now under appeal to this House. Notice to the company of an equitable title is valid and effectual, notwithstanding any provision in the company's articles of association, or in the Companies Acts, that trusts shall not appear upon the register; see *Ex parte Agra Bank* (7), which case arose under the Companies Act 1862, as appears from the report in the *Law Times* (8).

Sect. 30 of the Companies Act of 1862 has not the effect attributed to it by the judges below. There is not a word in it to say that the company shall not be affected by notice of a trust. A company cannot exclude notice of trusts by any provision in their deed: *Binney* v. *Ince Hall &c. Co.* (9). The object of sect. 30 was to keep the register clear, not to prevent the company being affected by notice. The present case is a stronger one than *Ex parte Stewart* (10). If as some of the Lords Justices seemed to think a company would be bound by a notice that a trustee was going to commit a fraud, then they must be bound by any notice. Logically there is no dividing line. The executors of J. S. Walker having omitted to give the notice which they ought to have given must be postponed to the appellants: *Cumming* v. *Prescott* (11).

(1) 3 Cl. & F. 456, 473.
(2) 6 D. M. & G. 714.
(3) 1 De G. & J. 163, 178, 179.
(4) Law Rep. 12 Eq. 354.
(5) 2 D. & War. 555, 561.
(6) 30 Ch. D. 261.
(7) Law Rep. 3 Ch. 555.
(8) 18 L. T. (N.S.) 154, 866.
(9) 35 L. J. (Ch.) 363.
(10) 4 D. J. & S. 543.
(11) 2 Y. & C. Eq. Ex. 488.

It was said below that the absence of the certificate was notice to the appellants of the prior equity of the executors. But that was not so: a reasonable explanation of the non-production was given.

[LORD BLACKBURN:—That point does not arise. Lopes J. was not asked to find any issue on it.]

The mere possession of the certificates is not enough to give a prior equitable title: *Shropshire Union Railways and Canal Co.* v. *Reg.* (1) The judgments of the Court of Appeal in *Bradford Banking Co.* v. *Briggs & Co.* (2), following the decision of the Court of Appeal in the present case, shew to what startling consequences that decision must lead. The absence of the certificates did no more than put the appellants upon inquiry, and they did all that was incumbent on them, viz., inquire, and receive a reasonable explanation. A reasonable excuse for the non-production of title deeds is sufficient to prevent the legal mortgagee being postponed to an equitable mortgagee, in the absence of fraud or gross negligence: *Hewitt* v. *Loosemore* (3). The present case is à fortiori, for in personal property the possession of title deeds is not of the importance that it is in real property. There is nothing in the Companies Act of 1862 or in the articles of this company to make the production of the certificate a condition precedent to a transfer. The offer of the indemnity was equivalent to the production of the certificates.

Rigby Q.C. and *B. B. Rogers* for the respondents were not heard, Lord Halsbury L.C. saying that the decision below would be affirmed for reasons to be given on a future day.

Dec. 17. EARL OF SELBORNE:—

My Lords, the appellants in this case cannot succeed unless they shew, either that they have acquired a legal title to the shares in question, unaffected, as between them and the respondents, by any equity; or that (both titles being equitable) their equity, though posterior in time, ought to be preferred to that of the respondents.

(1) Law Rep. 7 H. L. 496. (2) 29 Ch. D. 149; 31 Ch. D. 19.
(3) 9 Hare, 449.

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A complete legal title to these shares could not be acquired without registration: and there has been none. The transfer, however, from James Montgomery Walker, under which the appellants claim, had been produced for registration to the officers of the Tramways Union Company before the 4th of January 1883, at which time the request for such registration was met by the opposing claim of the respondents, stated in their letter of that date to the secretary of the company. It seems to have been thought (though not decided) in the Courts below, that if the appellants' transfer (signed in blank, and without any numbers of shares or name of transferee) had been delivered by the transferor as his deed after the blanks were filled up, the appellants would have had a legal title, preferable (as such) to the equitable title of the respondents. Without such delivery the completed transfer was not James Montgomery Walker's deed: *Hibblewhite* v. *McMorine* (1); *Tayler* v. *Great Indian Peninsular Railway Company* (2); *Swan* v. *North British Australasian Company* (3).

The Courts below both thought (and I agree with them) that there was not, as against the respondents, any sufficient evidence of a delivery of the completed transfer by James Montgomery Walker. But even if there had been such evidence, I should not myself have considered a merely inchoate title by an unregistered transfer equivalent for the present purpose to a legal estate in the shares. Such a transfer might, indeed, give a legal right of action against the company if they, without just cause, refused to register it; it might also be a good foundation for an application to a competent Court to rectify the register. But it could not, under the 26th article of association of the Tramways Company confer (while unregistered) a legal title to the shares themselves: nor do I think that the fact of its execution and of a claim having been made to register it before the company had notice of the prior equitable title, would necessarily make it the duty of the company, after receiving such notice, to register it, or of a Court to compel them to do so, and thereby to effectuate a fraud, till then incomplete. If, indeed, all necessary conditions

(1) 6 M. & W. 200. (2) 28 L. J. (Ch.) 285.
(3) 7 H. & N. 603; 2 H. & C. 175.

had been fulfilled to give the transferee, as between himself and the company, a present, absolute, unconditional right to have the transfer registered, before the company was informed of the existence of a better title, the case might be different. But, in this case, I am of opinion that the appellants had not, on the 4th of January 1883 any such right, even if the transfer, after the blanks were filled up, had been delivered as his deed by James Montgomery Walker. That transfer was not accompanied by the certificates which, in companies of this kind, are the proper (and, indeed, the only) documentary evidences of title in the possession of a shareholder, and which, according to the usual course of dealing with such shares, ought to come into the hands of a bonâ fide transferee for value. The respondents, when they took their prior security, did obtain possession of those certificates; and on the face of each such certificate there was an engagement under the company's common seal that no transfer of any portion of the shares thereby represented should be registered without delivery of the certificate at the company's office. The appellants did not, indeed, know that the certificates were thus in the respondents' hands; and they may not have known that they were in that form. But they knew that they had not themselves got them; and that the company (as was said by Lord Cairns in the case of the *Shropshire Union Company* (1)), though it might not be bound to insist on their production before registering a transfer, was at least entitled to do so if it thought fit. They knew (as their manager, Mr. Dove, in his evidence admitted) that their own transfer was one which was "no good," "not in order," "of no value," for want of these certificates. The company (or those who in this matter acted for it) did in fact refuse to register that transfer without production of the certificates, unless the requisites for the issue of new certificates under their 35th article of association were first satisfied; and the liability which they might be under to any bonâ fide holder of the outstanding certificates was (in my judgment) an amply sufficient reason for that refusal. Those requisites were never satisfied, either before or after (if they could have been

(1) Law Rep. 7 H. L. 509.

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satisfied after) the 4th of January 1883, on which day both the company and the appellants became aware that the certificates had not been lost or mislaid (as James Montgomery Walker had falsely alleged) but that they were in the hands of the respondents as bonâ fide holders for value prior in date to the appellants.

The appellants therefore have not shewn either a legal title to these shares, or (or as between themselves and the company) an absolute and unconditional right to be registered as shareholders in place of James Montgomery Walker. Unless they can establish a right on equitable grounds to displace the original priority of the respondents, that priority must remain; and must, under these circumstances, prevail. Have they then made out any equitable case as against the respondents? I not only think that they have failed to do so, but I think the respondents have the better equity, not on the ground of time alone, but on the merits of the case. The respondents not only had the certificates, but they had the company's undertaking under seal that there should be no change of the registered title unless those certificates were produced. What more could be necessary, on any reasonable or intelligible principle, to "perfect" their equitable title, which they were under no obligation to convert into a legal title by registration? If they had given any notice of the kind required in cases within the principle of *Dearle* v. *Hall* (1), to the company, they would not thereby have constituted, between themselves and the company, any such relation as, in cases of that class, is the effect of notice. I think that according to the true and proper construction of the Companies Act of 1862, and of the articles of this company, there was no obligation upon this company to accept, or to preserve any record of, notices of equitable interests or trusts, if actually given or tendered to them; and that any such notice, if given, would be absolutely inoperative to affect the company with any trust; and if the company is not affected by it, I do not see how the directors or officers of the company individually can be. The Court of Appeal, without reference to the certificates, thought the principle of *Dearle* v. *Hall* (1) inapplicable to shares of this kind; and I agree with them. I do not understand in

(1) 3 Russ. 1.

what respect a notice not operative as against the company or its officers can have the effect of "perfecting" the equitable assignee's title. No authority was cited to shew that the doctrine of *Dearle* v. *Hall* (1) had been applied to such shares; and the reasons for that doctrine are, in my judgment, not applicable. The case is not like those under the bankrupt laws, in which the fact, or presumption, of a continuance (after a change in the equitable title) of the prior state of "order and disposition," or reputed ownership, "with the consent of the true owner," has to be in some way disproved. But in the case before your Lordships, that was actually done by the company's engagement under the deed in the respondents' possession, which could not have been done by any mere notice. This being the respondents' position, what is that of the appellants? They were content to trust to the statement of their transferor, that the certificates were "lost or mislaid,"—(as Mr. Colladon adds), that they "most likely had been mislaid with his private papers at home." What could be more easy, more obvious, than to require him to go at once and search for them among those papers? The appellants did no such thing. To obtain new certificates from the company, under article 35, if the old were lost, one of two alternatives was necessary —either (1) proof of the loss, satisfactory to the board; or (2) an indemnity, deemed by the board adequate. The appellants, passing over the first alternative,—neither requiring themselves from the transferor, nor offering to furnish to the directors of the company, any evidence of the alleged loss,—went straight to the other, that of indemnity. That negotiation came to nothing; the indemnity offered was not accepted; indeed, it never came for consideration before the board of directors. But the fact remains, that what the appellants proposed to give was not evidence of loss of the certificates, but indemnity, if it should turn out (as the fact was) that they were in the hands of some one to whom the company, if it registered the shares without their production, might be liable.

I am of opinion, that there is nothing here to displace the original equitable priority of the respondents: and I move your Lordships to dismiss this appeal, with costs.

(1) 3 Russ. 1.

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LORD BLACKBURN :—

My Lords, the argument of the appellants' counsel in this appeal was begun but not completed on the 21st of July last, when the peers present were the Lord Chancellor, Lord Watson, Lord FitzGerald, and myself. On the 8th of December the noble Earl (Selborne), was also present, and the argument was recommenced. The counsel for the appellants were heard. All of your Lordships were agreed that the appeal must be dismissed with costs, but judgment was not given at once, principally, I believe, because I wished, before stating my reasons for affirming the judgment, to examine more carefully how far it was necessary to express an opinion on a point of great practical importance, namely, what was the effect of the certificates of the shares having been delivered by the registered owner of the shares to one who took an interest from that owner by an instrument not amounting to a transfer of the shares.

This action was commenced by a writ of summons issued on the 6th of January 1883 by the now appellants as plaintiffs against the Tramways Union Company, Limited, James Montgomery Walker, and the present respondents, who are the personal representatives of James Scott Walker, and which was served on all three defendants. On the motion of the plaintiffs on the 9th of January, Pearson, J., made an order that the defendants, the Tramways Union Company, Limited, be restrained until after the 11th day of January 1883, or further order, from registering, and "that the defendants James Montgomery Walker, Janet Walker, William Stuart Walker, and Frederick Ramsay Walker be restrained until after the said 11th of January 1883, or further order, from directing the registration of any transfer of the one hundred shares of £5 each fully paid up, numbered 28,979 to 28,998 and 30,772 to 30,851 inclusive, in the undertaking of the defendants the Tramways Union Company, Limited, at the instance of the other defendants, or otherwise than to the plaintiffs or as they shall direct, and that the defendants, the Tramways Union Company, Limited, James Montgomery Walker, Janet Walker, William Stuart Walker, and Frederick Ramsay Walker be restrained until after the said 11th of January, 1883, or further order, from dealing, parting with, disposing of or

delivering the said shares, or any of them, or the certificates thereof, or any of them, or any transfers or alleged transfers thereof, otherwise than to the plaintiffs or as they shall direct."

On the 18th of January, by the consent of all parties, save James Montgomery Walker, it was ordered that the motion do stand over till the trial of this action, and that all further proceedings in this action against the defendants, the Tramways Union Company, Limited, be stayed.

The other defendant, James Montgomery Walker, never appeared to the writ. He was made bankrupt about the 20th of January 1883. Something was said as to whether these shares might not be property divisible amongst his creditors, under sect. 15 of the Bankrupt Act 1869, the statute then in force, but no such question having been raised, I say nothing on that.

From the making of the order of the 18th of January 1883 the action proceeded as depending on the question whether the plaintiffs or the representatives of the testator had the better title to these shares.

The Tramways Union Company, Limited, was formed under the Companies Act 1862. The sections of that Act which seem to me material are the 22nd, 30th, 31st, and 35th. I do not think it necessary to read them.

The articles of association which I think material I will read. They are as follows:—[His Lordship read articles 26, 28, 32, 33, 35, which are set out above.]

The name of James Montgomery Walker was entered on the register, and he obtained, as he was entitled to do, two certificates, one dated on the 13th of May 1875, for eighty fully paid-up £5 shares, numbered 30,772 to 30,851, both inclusive; the other dated the 16th of December 1875 for twenty fully paid-up £5 shares, No. 28,979 to No. 28,998, both inclusive. Each of these certificates was under the seal of the company, and was signed by a director and countersigned by J. E. Walker, then and still secretary to the company.

On each of the certificates was printed—"Note. No transfer of any portion of the shares represented by this certificate will be registered until the certificate has been delivered at the company's office." Before stating what makes this, in my opinion,

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important in this case, I think it better to state briefly what is the state of the legislation on the subject.

When first shares in joint stock companies were made transferable, and actions were brought by vendors against purchasers of such shares, a difficulty arose as to what was sufficient evidence of the title of the vendor to the shares which he required the purchaser to accept. To meet this difficulty, in the first Joint Stock Companies Act, that of 1844, 7 & 8 Vict. c. 110 s. 52, it was enacted "that it shall be the duty of all Courts of justice, judges, justices, and others to admit such certificate as primâ facie evidence of the title of the shareholder to the share therein specified; nevertheless the want of such certificate shall not prevent the holder of any share from disposing thereof."

And in the Companies Clauses Consolidation Act 1845, and the Companies Clauses Consolidation (Scotland) Act 1845, under the head Distribution of Capital, is a clause (sect. 12) the same in both Acts: "The certificate shall be admitted in all Courts as primâ facie evidence of the title of such shareholder, his executors, &c., to the share therein specified; nevertheless the want of such certificate shall not prevent the holder of any share from disposing thereof."

The Act of 1844 was repealed by the Joint Stock Companies Act 1856, the 20th and 21st sections of which are: "20. The transfer of any share in the company shall be in the form marked F in the schedule hereto, or to the like effect; and shall be executed both by the transferor and transferee; the transferor shall be deemed to remain a holder of such share until the name of the transferee is entered in the register book in respect thereof. 21. A certificate under the common seal of the company specifying any share or shares held by any shareholder shall be primâ facie evidence of the title of the shareholder to the share or shares therein specified."

This Act again was repealed by the Companies Act 1862. The Companies Clauses Consolidation Acts of 1845 have not, as far as I am aware, been altered, as far as regards this subject, by any subsequent legislation.

Now, I quite agree that the legislature did not enact that the production of the transferor's certificate should be a condition

precedent to the registration of the transfer; and in the earlier Acts it was expressly declared that the want of possession of a certificate should not prevent the holder of a share from disposing of the same. But very soon (I cannot tell how soon) those who took as security from the holder of shares an engagement by which he bound himself not to part with the shares to any one else until that security was discharged, perceived that the security would practically be much better if they had the certificates in their possession. The registered holder of the shares still might, if dishonest enough, in violation of his contract, execute a transfer, but he would have much more difficulty in finding a transferee who bonâ fide would be led to believe that he was entitled to do so. And, I do not know how soon, those who managed companies of this kind and had the control of the register became aware that, if they registered a transfer at once on its being presented to them, even if it was accompanied by the certificates, or, as it is called, "in order," there was a risk that they might register a forged transfer, and not only do an injury to others, but put the company itself in a difficulty. It became, therefore, usual when a transfer was brought, not to register it at once, but, as one precaution, to write to the registered address of the shareholder, and inform him that such a transfer had been lodged, and that if no objection was made by him before a day specified, it would be registered. This was the course pursued in *Tayler* v. *Great Indian Peninsular Railway Company* (1), and the notice thus given enabled Tayler to prevent the registration of what turned out to be forgery. Soon after this the case arose of *Ex parte Swan* (2), *Swan* v. *North British Australasian Company* (*Limited*) (3). That company was framed under the Act of 1856. The certificate was under the seal of the company, and on it was a note: "No transfer of any of these shares will be registered unless accompanied by this certificate." It is printed in the report (4), and was dated the 15th of September 1857. This is the earliest mention that I can find of such a note. What purported to be a transfer duly executed by Swan to Horace Barry, accompanied by the certificates, was lodged with the company. The transfer

(1) 28 L. J. (Ch.) 285.
(2) 7 C. B. (N.S.) 400.
(3) 7 H. & N. 603; 2 H. & C. 175.
(4) 7 C. B. (N.S.) 411; 7 H. & N. 613.

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deed and the certificate are set out in the report (1). The secretary of the company adopted the same precaution as had been adopted by the Great Indian Peninsular Company, and, before registering, wrote to the address given by Swan to them viz., Robert Swan, care of W. L. Oliver, 4 Austin Friars, Old Broad Street, describing the transfer lodged and the certificate, and adding, "The transfer will be retained here for three clear days from the date hereof, in order to afford you an opportunity of communicating with me in the event of there being any irregularity in the transaction; and failing your reply within the time mentioned, the transfer will be registered and a new certificate issued to the purchaser." The forger, Oliver, who was afterward convicted, intercepted this letter. The transfer was registered and a new certificate issued to Barry. The result of the litigation shewed that even after all those precautions the company did suffer from registering the transfer, being obliged in the end to restore the shares to Swan.

In *In re Bahia and San Francisco Railway Company* (2) the facts were very similar but the point decided was not quite the same. The certificate is set forth in the special case (3), and probably had not on it such a note, at all events it is not there set out. But the point decided was that the company were liable to make good their loss to persons who had purchased and paid for the shares from those who produced genuine transfers from those who had been registered along with genuine certificates granted to them, although that register was set aside. All the judges put it on the ground that in the usual course of business the production of the certificates along with the transfer entitled the transferee to pay on the faith of the certificate, which therefore amounted to a preclusion against the company.

This certainly, in my mind, shews that those on whose advice companies before registering a transfer, which would entitle the transferee to a certificate, required that the certificate already issued should be produced, or its non-production accounted for, advised well; and that the note on the certificate to this effect calling the attention of those who had the shares was fair and

(1) 7 C. B. (N.S.) 410. (2) Law Rep. 3 Q. B. 584.
(3) Law Rep. 3 Q. B. 587.

proper. Such a note does not prevent this company if a proper case is made before them, from exercising the power given by article 35. Nor does a similar note on a certificate issued by a company, under the Companies Clauses Act 1845, prevent the directors from exercising the similar power given by sect. 13 of the Companies Clauses Act 1845; but it does make it important for those who purchase shares to see that the transfer is not only by a deed duly executed, but is accompanied by the certificate. Unless that is so, the transfer, to use the phrase of the witnesses in this case, is "not in order." And without going further, it at least makes it not wrong for the company to pause and make some inquiry before exercising their powers. And bearing in mind this practice I am quite unable to understand how it came to be thought that the plaintiffs had given to the company a notice of an equitable title, such as to make them trustees for the plaintiffs, even if the company could be bound to take notice of trusts.

It appears that James M. Walker was extensively engaged in transactions on the Stock Exchange with the plaintiffs. On the 14th of December 1882 he was indebted to them on the balance of account £7000 and upwards, and Mr. Colladon the manager for the plaintiffs had intimated to him that he must pay or be sued. The writ was not actually issued till the 16th of December, nor served till the 18th of December, but J. M. Walker, on the 14th or 15th of December, offered amongst other things to give Colladon a hold on 100 £5 shares in the Tramways Union Company (Limited), and sent to him what is called a blank transfer. Had the certificate accompanied that blank transfer there would have been in my opinion a sufficient indication of an intention that Colladon should hold that certificate. But Dove, Colladon's clerk, seeing that the certificate was not there, went to James M. Walker, and as he swears (Appendix p. 53), "pointed out that the certificate was not attached, and it was not in order, and that it was no good." He asked J. M. Walker for the certificate (Appendix p. 54), "and he said he had not got it. He said that it had been lost or mislaid, that if I went to the company I would find that it would be put in order." Dove did go to the company's office and saw the company's clerk Mr. Mitchell, and

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Mr. Mitchell told him (Appendix p. 55), "he had not any instructions from Mr. Walker, besides which the transfer was not stamped and did not contain the numbers;" certainly very sufficient objections. I gather, though it is not very clearly brought out, that Mitchell then referred to the register and shewed Dove that J. M. Walker was on the register for 100 £5 shares, and told him what the numbers were.

We now come to written evidence. On the 19th of December J. M. Walker wrote to Colladon:—"The Tramways Union shares will also be in order for delivery on account day." On the 20th of December Colladon's broker sold 100 Tramways Union shares for the account day, the 29th of December, and, I suppose, according to the usual practice, advised Colladon that he had done so. On the 22nd of December Colladon, writing on behalf of the plaintiffs to J. M. Walker on a number of other subjects, says (p. 168): "We must insist on your putting the Tramways Union transfer in order. We have been promised day after day that it would be attended to, but so far without result." No clearer evidence could be given that the transfer was not in order for want of certificates, and that the plaintiffs knew that it was not so in order.

On the 28th of December, the day before the account day, J. M. Walker wrote a letter addressed to the secretary of the Tramways Company, which he signed both with his own name and with the name of his firm, in which he was sole partner. I will read it:—"The Secretary, Tramways Union Company, Limited.—9 Old Broad Street, London, E.C., 28th of December 1882. Dear Sir,—The certificates of 100 shares, numbered 28,979 to 28,998 and 30,772/51, in your company in favour of James Montgomery Walker, of 9 Old Broad Street, E.C., having been lost or mislaid, we shall feel obliged if you will certify the enclosed transfer, and we hereby undertake to hold you harmless and indemnified against any loss which may arise in the event of the missing certificates being forthcoming at any future time. Yours truly,—J. M. Walker,—Walker, Russell, & Co."

I never before met with the phrase "to certify a transfer," and I do not understand it. It is plain enough that J. M. Walker requested the secretary, and through him the company, to do

something which would put the transfer in order; and the board of the company and the secretary, acting together under the 35th article, could have renewed the certificates which would have had that effect. And perhaps the board might have waived the condition for which they had stipulated by the note indorsed on the certificate, and registered a transfer though the certificate was not produced; the secretary alone could do neither, still less could the clerk. This letter was carried by Dove, the plaintiffs' clerk, to Mitchell, the clerk of the company, who in the absence of the secretary, who had during the whole month of December been on the continent, acted for him. The transfer, which was taken down along with the letter, had now been filled up so as to appear on the face of it to have been executed by the parties, and it was duly stamped. Whether or not Mitchell knew that it had not really been executed after it was filled up, we do not know; for though Mitchell was in Court neither side called him as a witness. He certainly made no objection on that ground, and if he had done so, it would have been in the power of J. M. Walker to cure the objection by re-executing the transfer. Mitchell seems to have said nothing could be done without a banker's guarantee.

On the 30th of December a letter, similar in all respects but the date to that of the 28th, was brought down stamped and signed as a guarantee by the plaintiffs, who are bankers. Mitchell seems to have said he meant the bankers of Mr. Walker, and on Dove offering to procure the guarantee of Glyn's refused to do anything. I infer that he by this time suspected that J. M. Walker was not solvent, for as far as regards security to the company it was not material whether the bankers who gave the guarantee were those with whom J. M. Walker kept his account or others. The 30th of December in that year was on Saturday. On Monday the 1st of January 1883 the secretary returned from abroad and resumed his duties, and Mitchell reported to him what had taken place; he approved of it. On the 4th of January 1883 Messrs. Miller, Smith, & Bell, solicitors for the representatives of the testator, who had been pressing J. M. Walker to execute a transfer of the shares, gave to the secretary a formal letter, which I will read:—"3 Salters' Hall Court, E.C., 4th

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January 1883. Dear Sir,—On behalf of the trustees and executors of the late Mr. James Scott Walker we have to give you notice that the certificates for shares in your company numbered 28,979 to 28,998, and Nos. 30,772 to 30,851, were deposited by Mr. James Montgomery Walker with the late Mr. James Scott Walker with a transfer signed by Mr. James Montgomery Walker, and that the share certificates are now in our possession on behalf of the executors, and we have to warn your company not to allow Mr. James Montgomery Walker to deal with these shares, as should the company recognise any such dealings we should, on behalf of the executors, claim from the company the value of the shares. Yours faithfully, Miller, Smith, & Bell. J. E. Walker Esq."

Lindley L.J., in the present case, says (1): "If he, J. M. Walker, had executed a proper transfer to the plaintiffs the plaintiffs would have acquired a legal right to have the transfer to them registered, if they gave the company a proper indemnity against the consequences of registering the transfer without the production of the certificate of the ownership of the transferor." He adds, "The right to the shares passes by the transfer, and the articles of the company do not make the production to the company of the transferor's certificate a condition precedent to the registration of the transfer."

In the view of the facts which all the judges below took, James M. Walker, though there was nothing to prevent his actually executing a deed transferring the shares to the plaintiffs, never did execute one, and therefore on this view of the facts it was not necessary to decide this point.

But it was strongly argued at your Lordships' bar that there was evidence from which it ought to be, or at least might be, inferred that he had legally executed a deed of transfer. And though I individually think that the evidence does not shew that he had done anything equivalent to an execution of the transfer after it was filled up, I believe some of your Lordships were not prepared to decide upon that ground. And I think it quite clear that the clerk of the company never did put their objection on the ground that the transfer was not duly executed by James M.

(1) 14 Q. B. D. 458.

Walker. If he had done so the plaintiffs might, and I suppose would, have asked James M. Walker to execute the transfer over again; and he, having gone so far as he had done, would probably have done so if requested.

If, therefore, I agreed with the law as stated in the passage I have read, I should certainly feel much difficulty in deciding against the plaintiffs. But I think that there are important qualifications which should be put on this statement of the law, and it was partly because I was desirous of stating accurately what these were that your Lordships did not deliver judgment at once.

I think the authorities to which I have referred shew, that even if a transfer is in order, that it is accompanied by the certificate, the company are not bound to register it at once. They are entitled (it is not necessary to inquire whether they are bound) to delay for a reasonable time, and to make reasonable inquiries before registering; and it is, I believe, the general practice to delay the registration at least till there has been an opportunity given to the registered holder to answer a letter of advice telling him that a transfer has been lodged.

It is not necessary to inquire whether if the company were to register a transfer without any delay or making any inquiry, they would incur any responsibility against which this company would require a guarantee. It is enough to say that, even if the transfer had been duly re-executed by J. M. Walker there was nothing that had occurred previous to the 4th of January, when the notice was given by Messrs. Miller, Smith, & Bell, to make it obligatory on the company to register the transfer. After the receipt of that notice nothing which they did could have affected the prior right of the respondents.

I do not doubt that the judges in the Court of Appeal put the right construction on the Companies Act 1862 as to the notices of trust, but I do not think it necessary to decide that.

LORD WATSON:—

My Lords, I concur. I do not think there are facts proved in this case sufficient to warrant the inference that the transfer of these shares was after its completion redelivered to the appellants

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by Mr. James Montgomery Walker; but whether it be true that the transfer in question was or was not duly executed by Mr. Walker, I am still of opinion that upon either of those assumptions the respondents are entitled to our judgment.

LORD FITZGERALD:—

My Lords, I concur in your Lordships' decision.

The defendants have the prior equitable title in point of time, and the question is whether the appellants (plaintiffs) have established that on the facts and in law their subsequent title, if they have any, ought to be preferred.

As the question relates to shares in an institution which derives its vitality from the statute of 1862, we must look to that statute and the articles of association of the company to ascertain the position of a shareholder and his powers of transfer, and the provisions made by the statute and the articles for the protection of the association. The sections of the statute have been already referred to by two of the noble Lords who have preceded me, and therefore I abstain from again referring to them. "Primâ facie title," in sect. 31 means that the certificates shall be evidence that the title of the holder is correct until the contrary shall be made to appear. James Montgomery Walker does not appear to have been an original member of the company. He seems to have acquired his shares by transfer in 1875, and he accepted the shares "subject to the articles of association and to the regulations of the company," one of which is specially expressed in the note indorsed on the certificate.

The appellants (the plaintiffs) contended, first, that they had obtained an actual valid transfer of the legal ownership in the shares, and had therefore the legal right to be registered; and, secondly, that if their title was only equitable, that equitable title was at least equal to that of the respondents, and had obtained priority by notice to the company.

The step which the plaintiffs had first to establish was that after the blank transfer had been completely filled up, James Montgomery Walker, being aware of its contents, had acknowledged it, and done some act equivalent to delivery of it as his deed. I was for some time very much struck with the considera-

tion that on this question the letters of the 28th and 30th of December, or the inference to be deduced from them, would probably have operated by way of estoppel against James Montgomery Walker, had the litigation been with him. It seems different, however, as between the plaintiffs and the present defendants, who are pledgees of the shares for value, and whose prior title the plaintiffs seek in this litigation to displace. The onus lies on the plaintiffs to prove, as against the defendants, the due execution and delivery of the deed of transfer in a complete form as a deed. They have failed to prove, as against the defendants, that after the transfer had been filled up James Montgomery Walker ever saw it or was aware of its complete contents or of Colladon being the transferee; and Dove states that when he got the letter of the 28th of December signed by James Montgomery Walker the transfer was not produced to him. The plaintiffs have therefore failed to do that which was incumbent on them, viz. to prove as against the defendants the due execution of the transfer.

We are, therefore, relieved from considering what might have been the effect of a due execution of the deed of transfer, without more, on the rights of the parties, having regard to the provision of the 26th of the articles of association, that "shares shall be transferable *only* by deed executed by the transferor and transferee, *and* duly entered in the register of transfers."

I have now to consider the first branch of the plaintiffs' second proposition, viz., that the equities of the two parties were equal in all respects. Treating the plaintiffs' title (if any) to be equitable only, the facts to establish it in every respect exhibit infirmity. The documents on which it is supposed to be founded are the letter of the 15th of December, 1882, and an unstamped form of a deed of transfer signed by James Montgomery Walker and called, and justly called, the blank transfer, for it was a complete blank; and the letter, though it mentions "100 Tram Unions," fails to ear-mark or pledge any particular shares; and Dove admitted the supposed transfer to be of no value. On the 16th of December Dove knew this. Nothing appears to have been done until the 28th, when the instrument was filled up on information probably derived from the clerk of the company as

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to the numbers of the shares on the register in Walker's name, and Colladon signed as transferee. Then followed the incomplete transactions of the 28th and 30th.

I assume, however, for the purposes of my judgment, that the plaintiffs had obtained an equitable lien on the shares in question. On the other hand, the prior equitable title of the defendants is clear, plain, simple, and without a blot, and is accompanied by a delivery and pledge of the certificates of the shares.

Now, the statute and the articles of association must be taken together. The former shews that the certificates are to be primâ facie evidence of the title to the shares; and the latter that the certificates are the only instruments and evidence of title which the member is entitled to have delivered to him. The certificate is his title deed. The 12th article provides that the share capital is issued "on such terms and conditions and in such manner as the board may think fit;" and one of those conditions is expressed to be that "no transfer of any portion of the shares represented by the certificate will be registered until the certificate has been delivered at the company's office."

It seems to me that the parties are not in all respects in an equal position—that the defendants have the earlier pledge rendered effectual by the possession of the certificates, and that their prior and superior title has not been displaced by the evidence given by the plaintiffs. The opinion which I have thus formed renders it unnecessary for me to consider whether the notice alleged to have been given by the plaintiffs of their supposed equitable title to the company was a sufficient notice, and, if it was, whether it was inoperative to affect the position of the parties by reason of the 30th section of the statute, or the 22nd of the articles of association. I assume the notice to have been sufficient in substance, and am of opinion that it was operative for some purposes, but on the very large and important question decided by the Court of Appeal I do not feel it necessary to express any opinion. I entertain some doubt on the subject.

LORD HALSBURY L.C.:—

My Lords, at the close of the second argument in this case I had no doubt as to the judgment at which your Lordships should

arrive. Having since that time had an opportunity of perusing the opinion which has been delivered by the noble and learned Lord, Lord Blackburn, I wish only to express my entire concurrence in the conclusion at which he has arrived and in the grounds by which that conclusion is supported.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 17th December 1885.

Solicitors for appellants: *Michael Abrahams, Son, & Co.*
Solicitors for respondents: *Miller, Smith, & Bell.*

[HOUSE OF LORDS.]

THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY . . . } APPELLANTS

AND

TRUMAN AND OTHERS . . . . . RESPONDENTS.

Railway Company—Power to purchase by Agreement additional Lands—Nuisance authorized by Statute—Cattle Traffic.

A railway company were by their Act authorized among other things to carry cattle, and also to purchase by agreement (in addition to the lands which they were empowered to purchase compulsorily) any lands not exceeding in the whole fifty acres, in such places as should be deemed eligible, for the purpose of providing additional stations, yards, and other conveniences for receiving, loading, or keeping any cattle, goods, or things conveyed or intended to be conveyed by the railway, or for making convenient roads or ways thereto, or for any other purposes connected with the undertaking which the company should judge requisite. The company were also empowered to sell such additional lands and to purchase in lieu thereof other lands which they should deem more eligible for the aforesaid purposes, and so on from time to time. The Act contained no provision for compensation in respect of lands so purchased by agreement.

Under this power the company some years after the expiration of the compulsory powers bought land adjoining one of their stations and used it as a yard or dock for their cattle traffic. To the occupiers of houses near the station the noise of the cattle and drovers was a nuisance which, but for the Act, would have been actionable. There was no negligence in the mode in which the company conducted the business:—

Held, reversing the decisions of the Court of Appeal and of North J.,

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that the purpose for which the land was acquired being expressly authorized by the Act, and being incidental and necessary to the authorized use of the railway for the cattle traffic, the company were authorized to do what they did, and were not bound to choose a site more convenient to other persons; and that the adjoining occupiers were not entitled to an injunction to restrain the company.

Metropolitan Asylum District v. *Hill* (6 App. Cas. 193) distinguished.

APPEAL from a decision of the Court of Appeal (1).

By a special Act of 1837 (1 Vict. c. cxix.) the London and Brighton Railway Company (whose successors the appellants are) had the usual compulsory powers of taking for their line and works the necessary portions of the lands described in the deposited plans, subject to compensation to be made by the company.

Sect. 82 enacted that "it shall be lawful for the said company and they are hereby empowered to contract with any person or corporation (who shall be willing to sell the same) for the purchase of any lands, not exceeding in the whole fifty statute acres, in addition to the lands herein-before authorized to be taken, in such places as shall be deemed eligible, for the purpose of making and providing additional stations, yards, wharfs, waiting, loading and unloading places, warehouses, and other buildings and conveniences, for receiving, depositing, loading, or keeping any cattle or any goods, articles, matters, or things, conveyed or intended to be conveyed upon the said railway, or for making convenient roads or ways thereto, or for any other purposes whatsoever connected with the undertaking by this Act authorized, which the said company shall judge requisite." The rest of the clause enabled persons and corporations to sell.

Sect. 83 authorized the company to sell such additional lands or parts thereof, and to purchase other lands which the company should deem more eligible for the purposes aforesaid, and so on from time to time as the company should deem proper.

Sect. 124 required the company to sell superfluous lands within ten years from the passing of the Act. By sect. 127 the compulsory powers for the purchase of lands ceased after two years. By sect. 129, if the railway and works were not made

(1) 29 Ch. D. 89.

within seven years the powers ceased, with certain exceptions. Sect. 198 authorized the company to use locomotive engines and to convey passengers, cattle, or other animals and things (1).

The facts proved at the hearing are set out in full in the judgment of North J. (2). Briefly they were as follows:—In 1851 the appellants, under sect. 82, purchased between two and three acres of land between their station at East Croydon and Lansdowne Road, and for many years used it as garden ground for their servants. In 1881 Croydon having largely increased and the accommodation for the cattle traffic being wholly insufficient, the company devoted the land to the purposes of their cattle traffic and constructed a yard or dock for the cattle carried by the railway. The use of this place by the company being a nuisance to the respondents, the owners and occupiers of adjoining houses, they brought this action to restrain the company from carrying on their cattle traffic there in such a way as to be a nuisance to the respondents.

North J. granted an injunction (3), and this decision was affirmed by the Court of Appeal (Baggallay, Bowen and Fry, L.JJ.)

The defendants appealed.

July 16, 17, 21. *Rigby* Q.C. and *Ingle Joyce* for the appellants:—

The effect of the injunction is to control the discretion of the company in the selection of a site for the purpose of this traffic. The cattle traffic is expressly authorized, and must be a nuisance to somebody wherever carried on. The selection is given to the company, and unless they act malâ fide or negligently they cannot be restrained. The judges below proceeded upon an entire misapprehension of *Metropolitan Asylum District* v. *Hill* (4), where Lord Watson's observations seem to have been misunderstood. In that case the Act authorized a small-pox hospital if it could be set up without a nuisance. In the present case the traffic and its necessary accommodation are authorized whether a nuisance is created or not, provided there be no negligence.

(1) These clauses are set out in full in the report in 29 Ch. D. 90.
(2) 25 Ch. D. 423, 425.
(3) 25 Ch. D. 423.
(4) 6 App. Cas. 193, 215.

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[EARL OF SELBORNE referred to *Stockton and Darlington Railway Company* v. *Brown* (1).]

If the company removed to a place where there are now no houses, yet if houses were subsequently built in the neighbourhood, a nuisance would exist and another injunction might be applied for: *Sturges* v. *Bridgman* (2). If the company is prohibited here it may be everywhere at the instance of any adjoining owner, and practically it amounts to a suppression of the company's depot, for the company is limited to a small area. The small-pox hospital case was the case not of a railway company confined to a particular site or a choice of limited sites, but of a board at liberty to place the asylum in any convenient spot. The facts shew that the company here bonâ fide chose a convenient place and eligible for the purposes. The true question is not whether they take the site by compulsion or not, but whether they do without negligence that which they are authorized to do. The principle which governs the case is that which was the basis of the decisions in *R.* v. *Pease* (3); *Vaughan* v. *Taff Vale Railway Company* (4); *Hammersmith and City Railway Company* v. *Brand* (5).

William Barber Q.C. and *Alexander Young* for the respondents:—

The company's depot is an intolerable nuisance, being about 80 feet from the nearest to about 400 feet from the farthest of the respondents' houses, and the question is whether the statute has authorized this nuisance in perpetuity. The company, having obtained the site, not under compulsory powers, but by agreement, are in the same position as an individual without statutory powers. Having allowed the time limited for compulsory powers to lapse, and purchased under the additional powers, they cannot claim a statutory immunity. Where lands are authorized to be taken for additional purposes under a general roving power and are not shewn upon the plans, Parliament is unable to provide for securing the rights of the various parties,

(1) 9 H. L. C. 246.
(2) 11 Ch. D. 852.
(3) 4 B. & Ad. 30.
(4) 5 H. & N. 679.
(5) Law Rep. 4 H. L. 171.

and that is a reason for holding that Parliament cannot have intended to give that immunity which is conferred in the case of lands marked and known, and where all rights can be secured.

This case is governed by the principle of *Metropolitan Asylum District* v. *Hill* (1). The omission of any reference to compensation in sect. 82 shews that the legislature intended the company to be in the same position as private individuals. The statutory power to do what the company has done is permissive, not obligatory; if the company does nothing no one can complain. It was negligence in the company to choose this site, having power to choose other sites, where there would be no nuisance. *Lord Beauchamp* v. *Great Western Railway Company* (2) shews the distinction between works which the company can be compelled to make and accommodation works which they cannot. The establishment of a cattle dock is not necessary for the purposes of the company, and the company is in no better position than a private cattle dealer. Any use of land so acquired resulting in a nuisance would be actionable. The case is on all fours with *Jones* v. *Festiniog Railway Company* (3). [They also contended that upon the true construction of the Act the power under sect. 82 must be exercised before the expiration of the compulsory powers (seven years), and referred to *Kemp* v. *South Eastern Railway Company* (4) and argued that for other reasons the purchase of this land was ultrà vires. The arguments on this point are omitted as immaterial to this report.]

Rigby Q.C. was heard in reply.

The House took time for consideration.

Dec. 17. LORD HALSBURY L.C.:—

My Lords, in this case the plaintiff, Joseph Truman, the occupier of a house in Lansdowne Road, Croydon, and certain other co-plaintiffs, occupiers of houses in the vicinity, complain of the defendants, that in the year 1881 the defendants erected certain cattle pens, a cattle dock or yard, and have from that time to the bringing of the action used them for sheep, calves, and cattle,

(1) 6 App. Cas. 193.
(2) Law Rep. 3 Ch. 745.
(3) Law Rep. 3 Q. B. 733.
(4) Law Rep. 7 Ch. 364.

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daily and nightly, for the purpose of their being loaded and unloaded, and have thereby caused great annoyance to the plaintiffs, and have substantially interfered with their comfort and enjoyment in the occupation of their houses.

North J., before whom the action was tried, found that these allegations were established by the evidence, and the Court of Appeal was of opinion that that finding of fact was supported by the evidence. Neither the statement of claim nor any finding by the learned judge suggests that the defendants were guilty of any negligence in the use of the cattle pens and dockyard, as distinguished from the selection of its site, and the whole question turns on the right of the railway company to select and use that site, although its use may involve a nuisance to the neighbouring proprietors. That question must depend upon the authority which parliament has granted to the railway company.

The ground upon which North J. has proceeded in that respect, supported by the Court of Appeal, although for different reasons, has been, that it being competent to the company to select another site more convenient and less injurious to the plaintiffs, they have selected a site which has caused the injury of which the plaintiffs complain. It cannot now be doubted that a railway company constituted for the purpose of carrying passengers, or goods, or cattle, are protected in the use of the functions with which parliament has entrusted them, if the use they make of those functions necessarily involves the creation of what would otherwise be a nuisance at common law. Ever since the decision of *Rex* v. *Pease* (1) in 1832 it has been established so firmly by repeated decisions that that proposition is no longer within the region of controversy, and if these cattle pens and dockyards had been within the original limits of deviation, or what was equivalent to the limits of deviation in modern Acts, when the line was first authorized, and had been erected within those limits, I do not understand that any of the learned judges would have doubted that the company were acting within their powers, and were protected upon the principle I have stated above. For reasons which I will presently give I think the same question which arises now might with equal plausibility have been urged

(1) 4 B. & Ad. 30.

in that case. But I pass on to consider the distinctions which are supposed to take this case out of the general principle to which reference has been made.

The original Act was passed in 1837, and in the year 1881 the cattle pens and dock yard were erected and used. I do not stay to inquire whether they were selected with a due regard to the public convenience. In the view I take that is an immaterial question, because I think if the company were acting under their statutory authority, the absolute discretion of selecting the site was in them; if they were not they would, like any other persons guilty of a nuisance, be liable to be restrained from a continuance of it.

Now it seems to have been contemplated by the legislature, when passing the original Act, that it might become necessary, as time went on, to enable the company to provide additional stations and yards for receiving, loading, or keeping cattle, and for that purpose it enacted that, in addition to the lands authorized to be taken expressly, the company for such purposes might acquire other land, but restricted this power of purchase in several important particulars. The whole amount must not exceed fifty acres; it could only be taken by voluntary contract, and, as matter of physical necessity, it could only be taken when it could be used in connection with, and as auxiliary to, the railway authorized by the Act.

I believe the whole question must turn on the effect to be given to the section (82) which creates this flexible machinery for providing additional accommodation. Now it seems hardly to admit of argument that the statute intended such additional accommodation, when provided, to form part of and to be used with the railway, and, if so, to share the immunity which the railway, in its original construction, would have enjoyed from actions levelled at its use. It would be strange, indeed, if the legislature could be supposed to have authorized the railway to commit a nuisance up to a certain point, to have provided machinery for extending the railway and its use beyond that point, and yet to have allowed the further user to be open to an action to restrain its use. As I have said, the very same question which is now urged might, with equal force, have been

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urged against the original formation of the lines, and indeed was urged, though without effect, in *Rex* v. *Pease* (1). The limits of deviation give to the company a discretion as to where they will fix their line, and in *Rex* v. *Pease* (1) it was pointed out that the line might have been made within the limits of the company's powers so many yards from the highway as very much to diminish the nuisance to the traffic, which, in that case, was the main subject of complaint. That argument, however, was disregarded, and in none of the cases, so far as I am aware, has it ever been revived, though in many cases, conspicuously in *Hammersmith Railway Company* v. *Brand* (2), it might have been very plausibly urged that a few feet further off would sensibly have diminished the vibration. But, in truth, it would be impossible to apply such a principle; the old notion of people losing their rights of complaint because they come to a nuisance, has been long since exploded. Suppose the alternative site suggested in this place to have been taken. There may be at present no adjoining owners to Fairfield who would be disturbed in their occupation by the establishment of a cattle dock there, but hereafter houses may be built, and, unless some new principle of law is to excuse the railway company from liability for the existence of the nuisance, I am at a loss to understand why the future neighbours of Fairfield will not have as good a right to restrain the company as the present occupiers of Lansdowne Road. It may be not immaterial to observe that the 82nd section is equally applicable to passenger stations as to cattle pens, and I can quite imagine that the establishment of a passenger station might be a real annoyance to a neighbourhood previously free from the noise involved in such an establishment. If the argument addressed to us is sound as to cattle pens, it would be equally applicable to the creation of a new passenger station.

North J. and Baggallay L.J. expressly base their judgment upon the decision of your Lordships' House in *Metropolitan Asylum District* v. *Hill* (3). And it is a little singular to observe that the very phrases which some of your Lordships used in that case to distinguish the Act of Parliament which your Lordships were then construing from the class of Acts now under review,

(1) 4 B. & Ad. 30. (2) Law Rep. 4 H. L. 171. (3) 6 App. Cas. 193.

are relied upon as justifying the proposition that the decision of that case must govern the present. I think it is enough, in discussing that case, to say that the ground of decision was one which distinguished it from the present by reason of the very nature of the enactment which was then under discussion. The Railway Acts, treated as a well known and recognised class of legislation, were expressly and carefully distinguished from the permissive character of the legislation which your Lordships were then construing. Broadly stated, the distinction taken amounted to this, that a small-pox hospital might be built and maintained if it could be done without creating a nuisance, whereas the Railway Acts were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not.

I am, therefore, of opinion that the order appealed from ought to be reversed, the order of North J. discharged, the judgment entered for the defendants, and that the respondents should pay the costs both here and below.

EARL OF SELBORNE:—

My Lords, this was an action for an injunction and damages brought by the respondents against the appellants, for a nuisance alleged to be caused to the respondents and their families by the appellants bringing cattle and other animals to their cattle dock, yard and pens, situate on a certain piece of ground adjoining the Lansdowne Road at Croydon (on the opposite side of which the respondents' houses are situate), and keeping such animals there, or in trucks on the adjoining rails. It is found as the result of the facts in evidence, that there is a cause of action, unless the use made by the appellants of this land is authorized by their Acts; and also that there is no cause of action on the ground of negligence in the manner of doing what is authorized, if that use of the land is, in fact, authorized, so as to bring the case within the principle of *Rex* v. *Pease* (1); *Vaughan* v. *Taff Vale Railway Company* (2); and *Hammersmith Railway Company* v. *Brand* (3). The question, therefore, is whether it does or does not fall within that principle?

(1) 4 B. & Ad. 30. (2) 5 H. & N. 679. (3) Law Rep. 4 H. L. 171.

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The land, whether originally within the compulsory powers of the London and Brighton Railway Company (whom the appellants represent) or not, was not acquired under those powers or during their continuance. It was considered in the Courts below (and in this respect I see no reason to differ from them), to have been purchased by agreement under a power given by sect. 82 of the London and Brighton Railway Act of 1837. The compulsory powers of the company expired in 1839, and this land was purchased at a sale by auction in 1851. If it could be made out (as was contended on the part of the respondents) that the powers of the company to purchase lands by agreement, whether under the 82nd section or otherwise, were limited in point of duration to ten years by the 124th or to seven years by the 129th section of the Act, it would, in my opinion, follow, that as there would be no statutory authority for the acquisition, so there could be none for the use of this land, for any of the purposes of the railway. But I think it would be doing great violence to the language of those sections to put such a construction upon either of them. The purchase therefore was not unauthorized, though it could only be made (as it was made) by agreement.

What, then, were the purposes for which, by the 82nd section, the company was empowered to purchase "in such places as should be deemed eligible," lands not exceeding in the whole fifty acres, in addition to those otherwise authorized? The company had express power, under sect. 198, to convey upon their railway, in carriages propelled by locomotive engines or otherwise (inter alia), "all such cattle and other animals as should be offered to them for that purpose;" and the purposes expressed in sect. 82 were "making and providing additional stations, yards, wharfs, waiting, loading and unloading places, warehouses, and other buildings and conveniences for receiving, depositing, loading or keeping any cattle, or any goods, articles, matters, or things, conveyed or intended to be conveyed upon the railway." The purpose, therefore, for which the land now in question is used by the company is one expressly authorized by the section under which it was acquired; and it is a purpose incidental and necessary to the authorized use of the railway itself for the general cattle traffic of the undertaking. If the authority is not such as

to bring that use within the principle on which *Rex* v. *Pease* (1) and the other cases to which I have referred were decided, I do not see how it could have been different if the complaint had been of a nuisance by the noise of locomotive engines or trains passing over the same land, which might have frightened horses and caused accidents in the Lansdowne Road. I understood the learned counsel for the respondents to admit, as a necessary result of the principle of his argument, that this also would have been an actionable nuisance, and not within the ruling of *Rex* v. *Pease* (1).

That argument depended upon a distinction between lands taken under compulsory powers and those taken under a merely enabling power, when the particular lands to be purchased were not absolutely or within certain limits defined. It was not disputed that, if this land could have been, and had actually been, taken under the compulsory powers of the Act of 1837, or by agreement while those compulsory powers were existing and applicable to it, its use for the purposes complained of by the respondents would have been under statutory authority, and therefore not actionable. But the application of the same rule is denied as to land purchased by agreement under the 82nd section. Why so? It would seem, at first sight, that when land has been actually acquired under parliamentary authority by a railway company, and is used for the purpose, or for one of the purposes, for which the power so to acquire it is expressly given, that use is as completely authorized and in exactly the same way (the purpose being incidental to the general traffic of the company on their line) as if it had been acquired under any compulsory power. And although no exact site or local limits may be prescribed by the terms of the authority for the acquisition of that land, yet being directly subsidiary to the general traffic of the line, it follows from the very nature of the purposes authorized that it must be land contiguous to the railway or some of its stations, the local situation of the whole line of railway being within certain limits of deviation defined by the Act. The land to be purchased for these purposes may be "in such places as shall be" (i.e., by the company) "deemed eligible," but these

(1) 4 B. & Ad. 30.

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can only be places (in the case of cattle and other animals) suitable in point of position for "receiving, depositing, loading, or keeping cattle, &c., conveyed or intended to be conveyed upon the railway." When acquired it must become part of the railway and its appurtenances in exactly the same way as if similar loading and unloading places had been made upon lands taken when the railway was first made, whether by compulsion or by agreement. It would be (as it seems to me) inconsistent and unreasonable to suppose that the legislature intended land so acquired, for such purposes, to be separated, as to the legal conditions of its tenure and use for those purposes, from the rest of the undertaking with which it would have become incorporated, and as to which the rule, that what is authorized is not actionable, is acknowledged to prevail.

It was urged that the company having an option as to place were bound to exercise it so that no adjoining landowner (or I suppose any other person) should suffer detriment from the subsequent use of the land for the authorized purposes. If it were the duty of the company in deciding upon the eligibility of the place to be governed by such considerations, they might be placed in very great difficulty. For even if any place could be found where no person would be liable to suffer detriment from the establishment of loading and unloading places for cattle near his land, it is obvious that the other considerations relative to the convenience of the company's traffic, which the legislature must primarily have had in view, might have to be disregarded. The natural (and to the company and the public the most convenient) places for receiving and discharging cattle traffic to and from a railway must be in connection with, or in proximity to, stations at or near market towns or other populous places, certainly not in fields remote from any human habitations. But even if the company were to establish a cattle station at a distance from any human habitation it seems possible, from the case of *Sturges* v. *Bridgman* (1), that the law of nuisance might still pursue them there (unless protected from it on the principle of *Rex* v. *Pease* (2)) in the event of an adjoining landowner afterwards thinking fit to build a house upon his own property. If it

(1) 11 Ch. D. 852. (2) 4 B. & Ad. 30.

is the duty of a company, when they have any option, to select land (for the authorized purposes of their undertaking) so situated that its use for those purposes may not be detrimental, or may be as little detrimental as possible, to any adjoining landowner, I am unable to see why it should make any difference whether all the land as to which they have so to exercise their choice is situated within prescribed limits and subject to compulsory powers or not. In the case of *Rex* v. *Pease* (1) that argument was advanced (no doubt as to land within prescribed limits of deviation and under compulsory powers) without success.

I doubt much whether the order now under appeal would have been made if it had not been supposed in the Courts below that the principle of your Lordships' decision in the case of *Managers of the Metropolitan Asylum District* v. *Hill* (2) was applicable to the case of all land purchased otherwise than under compulsory powers, or within prescribed and definite local limits. With that opinion I am unable to agree. In that case the establishment of a small-pox hospital within certain local limits was not specially authorized, as the construction of the London and Brighton Railway for the purpose (among other things) of the loading, carriage, and unloading of cattle and other animals was here. If it had been, I do not think that this House would have considered the case of any adjacent land in a situation not defined, which the board might have been authorized to purchase by agreement for the enlargement, as they might think desirable, of the hospital premises, different from that of the site of the hospital itself. In that case no use of any land which must necessarily be a nuisance at common law was authorized; it was not shewn to be impossible that lands might be acquired in such a situation and of such extent, as to enable a small-pox hospital (if required by the Poor Law Board) to be erected upon them without being a nuisance to adjoining land. Here there can be no question that the legislature has authorized acts to be done for the necessary and ordinary purposes of the railway traffic (e.g. such as those complained of in *Rex* v. *Pease* (1)) which would be nuisances at common law, but which being so authorized are not actionable. In that case there were no compulsory powers; here there are the compulsory

(1) 4 B. & Ad. 30. (2) 6 App. Cas. 193.

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powers usually given to railway companies; and the land in question, though not acquired under those powers, was acquired for purposes expressly authorized, being ejusdem generis with those for which the compulsory powers were given, and was to be used in connection with and as subsidiary to the railway and other works executed under those powers. In that case there were no provisions for any compensation for any damage or injury to any persons under any circumstances. Here there are, the line being drawn, as is usual in Railway Acts, between lands taken or injuriously affected by the construction of the works (which are subjects of compensation) and lands which or persons who may suffer some subsequent detriment or annoyance from the authorized use of the railway and works when constructed; so that if the question had been one of compensation the respondents would not be within the line. In all these points, as it seems to me, the present case is not similar to, but is in direct contrast with, that of *Managers of the Metropolitan Asylum District* v. *Hill*. (1)

I am for these reasons of opinion that the order appealed from ought to be reversed, and the order of North J. discharged, and judgment in the action entered for the defendants, appellants here. No sufficient cause, that I can see, has been shewn why the costs, both here and below, should not follow the event. Whatever has been paid by the appellants to the respondents under the order of North J. ought of course to be repaid.

LORD BLACKBURN:—

My Lords, this is an appeal against an order of the Court of Appeal affirming a judgment of North J. of the 17th of December, 1883. That judgment was in favour of the plaintiffs below for damages for a nuisance, and ordering that the defendant company be perpetually restrained "from bringing cattle, calves, sheep, and other animals to their cattle dock yard and pens in the pleadings mentioned, and keeping such animals there or in trucks on the adjoining rails in such manner as to cause or be a nuisance and annoyance to the plaintiffs or any of them."

I take the following statement of the facts from the judgment

(1) 6 App. Cas. 193.

of North J. (1): "In the year 1851 the defendant company purchased a piece of land, between two and a half and three acres, lying to the west of their line between the station and Lansdowne Road. The purchase was doubtless made rather with a view to future requirements than for the present purposes of the company, as for many years the land so acquired, or a portion of it, was used as gardens for the servants of the company. The company are authorized by their Acts to be, and have from the first been, carriers of cattle. To give facilities for the receiving and loading and unloading thereof, certain structures called cattle banks, or cattle docks, and pens are found necessary, and in the early days of the railway these structures were erected on each side of the line very near to the general passenger station. These were found inconvenient, and about the year 1862 they were done away with, and a new cattle bank was erected . . . . In the year 1881 a new state of things arose. The town and neighbourhood of Croydon had increased enormously. It was the only place in the district where a cattle market was held, and the cattle trade had been very quickly and greatly developed. The accommodation at the old cattle bank had become wholly insufficient. It was incapable of extension on that site; the site, too, had become dangerous by reason of the extension of the goods yard and sidings in its immediate neighbourhood, and the increased difficulty of getting cattle from the cattle bank to the public road across the obstructions and by the route used also for carriages and foot passengers. In addition to this the requirements of the Privy Council with respect to the moving of cattle made further accommodation indispensable, and rendered a larger space for the purpose of this traffic imperatively necessary. To meet these requirements the company in the year 1881 devoted the piece of land I have mentioned to the purposes of their cattle traffic, and upon it they placed five or six new lines of railway sidings, and beyond this . . . . constructed what are called in the pleadings a cattle dock or yard and cattle pens, with an opening therefrom into Lansdowne Road through which all the cattle traffic has been carried since these new arrangements were completed. I may add that this was all done by the company in consultation with,

(1) 25 Ch. D. 426.

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and with the full concurrence of, the local authority and the Privy Council. The plaintiffs allege that these new works by the company are a nuisance, and seek to have them restrained by injunction (1)."

I think no attempt was made to deny that this statement was accurate, and I read it at length because it has an important bearing on the question whether what I shall presently shew is, in my opinion, the ratio decidendi of North J., can be supported.

It is not disputed that the appellants have since 1881 caused what would be an actionable nuisance, entitling the respondents to an action and an injunction against the appellants, unless the appellants could shew statutable authority to use locomotive power to propel trains, and to carry cattle in those trains, and unload them on this land, without liability to an injunction against the proper exercise of those powers, though they might injuriously affect their neighbours.

The appellants relied on the Act of 1837, and more particularly the 82nd and 198th sections of that Act, as giving them such powers. And in my opinion the principal question is whether the true construction of that Act does or does not give such powers.

I do not think there can be any doubt that if on the true construction of a statute it appears to be the intention of the legislature that powers should be exercised, the proper exercise of which may occasion a nuisance to the owners of neighbouring land, and that this should be free from liability to an action for damages, or an injunction to prevent the continued proper exercise of these powers, effect must be given to the intention of the legislature. No doubt when compensation is not given to those interested in the neighbouring land, this is, as against them, harsh legislation. But I think the construction of ordinary Railway Acts is now fixed. And whether they should have originally been construed so, or not, I agree with what is said by North J. (2) "Now it is clearly settled that the power to take defined lands compulsorily, and to make a line of railway thereon, and to use locomotives upon that line, entitles a company to run locomotives thereon, notwithstanding that in so doing they cause what in the absence

(1) 25 Ch. D. 426. (2) 25 Ch. D. 431.

of such power would be an actionable nuisance, provided always that they are not guilty of negligence. See *Rex* v. *Pease* (1); *Hammersmith Railway Company* v. *Brand* (2). The same section which enables the company to use locomotives also gives them the power to convey cattle and other animals; and this power to carry must necessarily, without the assistance of the 82nd section, include the right to load and unload them; and it seems to me to follow that the company have the same right to load and unload and to carry and convey cattle as they have to use locomotives, and that they are as free in the one case as in the other from liability to be sued for causing thereby annoyance to their neighbours, provided always that negligence is absent."

The Act of 1837 is such a Railway Act, but the 82nd section, it is said, is not subject to the same construction as the rest of the Act.

I do not think that any one of the judges below expresses any doubt, that if the cattle dock, yard and pens and rails had been laid down on the line within the limits within which there was originally power to take land compulsorily, it must (on the construction now to be put on Railway Acts) be held to have been the intention of the legislature to authorize the use of them free from action or injunction for the proper use of their powers on the part of those neighbouring owners who suffered annoyance to such an extent as would, but for the statutory authority given to the company, have entitled those owners to an injunction. But this only extends to the proper use of those statutable powers.

I do not think that if the company failed either in the fulfilment of the common law duty of taking proper care in the management of the traffic, which is what is in common language called negligence, or neglected any duty that on the construction of the whole Act it appears was cast upon them, which in a more technical sense is also included in the word "negligence," they are freed from an injunction.

It was not contended by the counsel for the appellants that the dock, yard, pens and rails, against the use of which the injunction was granted, had been erected under the general powers of the Act; they relied entirely on the 82nd section. Nor did they contend that the 82nd section in any way freed them from

(1) 4 B. & Ad. 30. (2) Law Rep. 4 H. L. 171.

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liability to an injunction if they were guilty of negligence either in its more limited or in its more extended sense; they denied that any negligence in the popular sense was proved. North J. at page 430, says expressly that "the charges of negligence fail," and no attempt was made, either in the Court of Appeal or at your Lordships' bar, to shew that this finding of fact was wrong.

The respondents both in the Court below, and at your Lordships' bar, argued that the powers given by sect. 82 had expired before 1851, as well as the general powers. If this had been so, there would have been an end of the question. But I agree with all the judges below, and I believe, with the Lords who heard this argument, that this is not correct.

I think it is now convenient to inquire what the true construction of the 82nd section is. I think it must be read along with the rest of the Act of 1837. It conferred a power on the original company and their successors, to whom their powers are transferred, to contract with any person "for the purchase of any lands not exceeding in the whole fifty acres, in addition to the lands authorized to be taken," and as they may by the 83rd section sell those lands and purchase others, this power may be exercised from time to time. The land is to be purchased in "such places as shall be deemed eligible," so that the choice of the locality is left to the company; there is no restriction as to where it may be, further than that the nature of things requires that it should be near enough to the line to be used for the purposes to which the company were to apply it. Those are enumerated:—"For the purpose of making and providing," inter alia, "additional stations, yards, waiting, *loading and unloading places* . . . . and conveniences for receiving, depositing, and loading or keeping any cattle . . . . conveyed or intended to be conveyed upon the railway . . . . which the said company shall judge requisite."

It seems to me impossible to read the statement which I have read (1) without coming to the conclusion that the company did on very sufficient grounds bonâ fide judge it requisite that there should be further conveniences for carrying cattle, and bonâ fide think the spot eligible; and I think the true construction of sect. 82 is that the legislature intended them to be judges of this. I cannot doubt (on the construction of the whole Act) that if

(1) 25 Ch. D. 426.

there is a sufficient indication in the body of the Act of 1837 of the intention of the legislature that locomotive power and cattle traffic might be carried on free from injunction, if properly carried on, or, as is said, without negligence, on land acquired under the general powers of the Act of 1837, there is also an indication of intention that they may be so carried free from injunction on land acquired for that purpose under the 82nd section. I agree entirely with the reasoning of the noble and learned Earl (Earl Selborne) on this point, and I do not repeat it.

It is, however, no doubt the fact that, under the 82nd section, the company are not bound to purchase any land, nor to apply it to any of the purposes mentioned, until they "judge it requisite," and even when they do judge it requisite they are not bound to apply any specific piece of land to those purposes, nor even a piece of land in any specific place; it is in such place as "shall be deemed eligible" by the company.

Fry L.J. seems to think that the continuing power of choice makes it wrong to put a construction on the Act of 1837, giving on the land required under s. 82 the same powers as I think it is not disputed were given by the body of the Act on the other lands. If that is the ground of his decision, I am unable to agree with him.

Much reference was made below to the opinions delivered in this House in the case of *Metropolitan Asylum District* v. *Hill* (1). Baggallay L.J. seems to think that principles were there laid down which made it impossible to put the construction on the 82nd section which I think ought to be put on it. I do not think that North J. went quite so far. And I think that Bowen L.J. dissented from that view. He says: "In construing Railway Acts, I do not think that we should be entitled to lay down a hard and fast line of distinction between the way in which companies may exercise their powers upon lands taken by compulsion, and the way in which they may exercise them upon lands taken by agreement. It seems to me that in this very case, by sect. 82, the intention of the legislature was as fully expressed that the company should carry out on the fifty acres of land to be purchased the objects for which such land was authorized to be purchased, as that it should carry out its general objects on the

(1) 6 App. Cas. 193.

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lands which it was empowered to purchase compulsorily. It is true that the absence of all intention to interfere with private rights in an Act of Parliament puts an end to all controversy as to the right to commit a nuisance; and in the case of *Metropolitan Asylum District* v. *Hill* (1) there was not to be found in the Act any element of compulsion, or any indication of an intention to interfere with private rights. I do not, however, think that the absence of one particular indication of an intention to interfere with private rights, or the presence of any one indication of such an intention, is necessarily decisive." (2) I prefer to adopt this language as my own to attempting to express the same idea in other words.

The ratio decidendi of North J. is, I think, to be found at 25 Ch. Div. p. 441. He says: "The plaintiffs' counsel endeavoured to shew that there was another site, called Fair Field, at least as, if not more eligible, but if the onus of proof of any such matter were on them, they failed to establish it. I have no doubt that the directors have selected the site which they, in the bonâ fide exercise of their discretion, considered most advantageous to their shareholders in the first place, and possibly also to the trade and public in the second."

He quotes a passage in Lord Watson's judgment in *Metropolitan Asylum District* v. *Hill* (1), and then says, at p. 441: "In the present case it is pleaded that the company were guilty of negligence in selecting a place for their cattle yard and pens which was not suitable for the purpose. The fact that a nuisance is proved to exist without any negligence in the mode of conducting the business there, shews that the place is not suitable for the purpose." (In this I cannot agree.) "To justify this it would, according to Lord Watson's view, be necessary for the company to prove, in addition to an imperative direction to erect such yard and pens somewhere within defined limits, the impossibility of erecting them anywhere else within those limits without their being a nuisance to any one. The onus of proving this would be on the defendants, and they have not proved it or even given any evidence upon the subject." I quite agree that if the true construction of the Act of 1837, including the 82nd section, is to impose on the company an obligation to prove this,

(1) 6 App. Cas. 193. (2) 29 Ch. D. 109.

they have not proved it. But I cannot agree that any such obligation is imposed upon them. That would in effect deprive the directors of all discretion. I do not think that any principle having this effect was laid down by Lord Watson or any other Lord in *Metropolitan Asylum District* v. *Hill* (1). I understand the passage cited as giving Lord Watson's reasons for construing the Act then before the House, as not giving any power to do any act interfering with the rights of others against their will, on the ground, as is said by Bowen L.J. in the passage I have cited, "that there was not to be found in the Act any element of compulsion or any indication of an intention to interfere with private rights."

I do not think that it is shewn that there was any onus cast on the company to give any such evidence as is suggested. I think it is not consistent with their having any power at all given them by the 82nd section, and that a construction which imposed that duty would render the section nugatory.

I therefore come to the conclusion that the order proposed by the noble and learned Earl (Selborne) whose opinion I have seen is right.

LORD FITZGERALD:—

My Lords, I entirely concur in the order proposed. I have read the very able and elaborate judgments which have been delivered, and I have nothing to add.

Order appealed from reversed: Order of North J. discharged; and judgment in the action to be entered for the defendants: the respondents to pay the costs of the action below and of the appeal to this House, and also to repay to the appellants the damages and costs which they have paid to the respondents. Cause remitted to the Chancery Division.

Lords' Journals 17th December 1885.

Solicitors for appellants: *Norton, Rose, Norton & Co.*
Solicitors for respondents: *John Holmes & Son.*

(1) 6 App. Cas. 193.

[HOUSE OF LORDS.]

H. L. (E.) 1885 Dec. 18.

THE ATTORNEY-GENERAL AT THE RELATION OF THE BOARD OF WORKS FOR THE WHITECHAPEL DISTRICT, MIDDLESEX . } APPELLANT;

AND

ROBERT HORNER . . . . . RESPONDENT.

Market, Grant of "in sive juxta"—Market, Extension of—Dedication of Streets subject to Market Rights—Highway, Dedication of subject to Market rights.

By letters patent in 34 Charles II. the king granted market rights "in sive juxta" a certain place called "Spittle Square" to one who was lessee of the square and had acquired the greater part of the reversionary interest in it. The grantee or his successors in title laid out the square as a market place with four internal streets. The land immediately surrounding the square was afterwards laid out in four external streets, but it did not appear to whom the property in this surrounding land at any time belonged. There was evidence of a usage from the time of living memory to grant licenses and take tolls for the sale of marketable articles over parts of the external streets as well as over the market place and the internal streets:—

Held, affirming the decision of the Court of Appeal, that under the grant "in sive juxta" the market rights extended into the four external streets as well as over the market place and the four internal streets; and that the inference from the documents and evidence was that the streets were dedicated to the public subject to the exercise of the market rights.

Quære, how far a grant "in or near" a place can lawfully extend.

APPEAL from a decision of the Court of Appeal (1).

At the trial of the information before Stephen J. without a jury evidence was given to the following effect:—

By letters patent of the 29th of July 1682, in 34 Charles II., the king granted to Balch, his heirs and assigns, the right to hold a market on Thursdays and Saturdays in every week "in or near a certain place called Spittle Square" ("in sive juxta quodam loco vocato le Spittle Square") in the parish of Stepney, together with all dues, tolls, piccage, stallage, and other profits, advantages, and emoluments whatsoever to such market in anywise appertaining.

At the time of this grant Balch was the lessee of a block of

(1) 14 Q. B. D. 245.

land then called "Spittle Square" (1) under a lease for eighty years dated the 17th of December 1672, and subject to a covenant therein not to build on the land; and he had also acquired the greater part of the reversionary interest therein. Balch died in 1683, and by a decree in a Chancery suit his successors in title were discharged from the covenant not to build.

By letters patent of the 22nd of September 1688 (reciting the letters patent of 34 Charles II., and that Balch's market rights had become vested in Boun) James II. abolished the Thursday market, and granted to Boun in lieu thereof a market on Monday and Wednesday in every week. The letters patent of James II. were (it was contended) made void by 2 Wm. & M. sess. 1, c. 8 s. 4; see the judgments in *Goldsmid* v. *Great Eastern Railway Company* (2).

At some time after the letters patent of Charles II. the block of land therein called "Spittle Square" was laid out by Balch or his successors in title as a market place, intersected by streets named North Street, East Street, South Street, and West Street, and hereinafter referred to as the four inner streets. The land immediately surrounding "Spittle Square" was afterwards laid out in streets named Lamb Street, Commercial Street, Brushfield Street, and Crispin Street, and hereinafter referred to as the four outer streets.

It was common ground between the parties that none of these streets, either inner or outer, were dedicated to the public at the time of the letters patent of Charles II., but at what time they were made or dedicated did not appear. Neither did it appear to whom the property in the surrounding land at any time belonged.

By 12 Geo. 3 c. xxxviii., ss. 13, 15 certain Commissioners were empowered to pave and repair the above inner and outer streets, among others; and to remove stalls or other encroachments upon such streets. Sect. 37 imposed a penalty upon any person placing waggons &c. upon any of such streets so as to occasion any annoyance.

By 28 Geo. 3 c. lx. s. 11 penalties were imposed upon any

(1) Another part of the parish seems now to be known as "Spital Square."

(2) 25 Ch. D. 511, 538, 546, 557; 9 App. Cas. 927, 955, 956.

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person exposing or licensing the exposing to sale marketable articles, or placing stalls &c. in or upon the said streets, so as to obstruct or incommode the passage thereof. Sect. 12 imposed penalties upon any person placing waggons &c. in the said streets "other than for the necessary loading or unloading thereof," and empowered the removal thereof.

The 57 Geo. 3 c. xxix. (Local) ss. 65, 66 contained further powers to the Commissioners and prohibitions against nuisances in the said streets.

By 18 & 19 Vict. c. 120 ss. 90, 91 the powers and duties of the Commissioners were vested in the Whitechapel District Board.

The respondent was lessee of the market from Balch's successors in title, and he produced evidence that from time of living memory the market rights had been exercised not only over the market place and the four inner streets but also over parts of the four outer streets.

The information was brought by the Attorney-General at the relation of the Whitechapel District Board against the respondent, claiming an injunction to restrain him from exercising market rights over any of the four inner or the four outer streets, or from doing any other thing contrary to the provisions of the above statutes.

Stephen J. gave judgment for the plaintiff and granted an injunction, the terms of which appear from the report of the decision below (1). The Court of Appeal (Brett M.R., Cotton and Lindley L.JJ.) reversed this judgment and entered judgment for the defendant.

From this decision the plaintiff appealed.

Dec. 16, 17, 18. *Finlay* Q.C. and *F. H. Colt* (*F. C. Gore* with them) for the appellant:—

The words "in sive juxta" in the letters patent must be read alternatively. It cannot have been intended to grant market rights over "Spittle Square" and in addition over an indefinite area adjoining the square to Balch, who had no property or interest in that adjoining area. The words "in sive juxta"

(1) 14 Q. B. D. 248, 249.

may have been inserted to avoid any difficulty in case the description of the place was inaccurate. The market rights never existed over any of the inner or outer streets: and this appears from the terms of the statutes of Geo. 3. Or if such rights did extend over any of those streets, those statutes took them away, for they are inconsistent with the statutes. The letters patent could not confer as against the public any right of market upon a public highway. The grantee must obtain permission from the owner of the soil to make the grant effectual. In this case the streets in question were not dedicated to the public till after the letters patent, and there is nothing whatever to shew that they were dedicated subject to the market rights.

The main question is whether there has been such a user as will lead the House to find that there was a grant by the owner of the soil of the right to hold a market. The proposition contended for by the appellant is stated by Jessel M.R. in *Mayor of Manchester* v. *Lyons* (1), "the market is the proper market, and the fact that some persons improperly sell provisions in the street outside does not extend the market." Upon the facts, all the judges below thought the ownership of the soil in the four streets surrounding the square was not in Balch, or his successors in title. The Crown has not the right to authorize a market in a highway without the concurrence of the owner of the soil. There is no distinct authority for that proposition, but it follows from the principle that the property of a highway is in the owner of the soil, and that a person who is on the highway otherwise than in exercise of the public right of way is a trespasser and liable to an action, or to criminal proceedings in some cases, e.g. if in pursuit of game: *Dovaston* v. *Payne* (2); *Reg.* v. *Pratt* (3). See also *Reg.* v. *Nickless* (4), cited in 1 Russell on Crimes, 5th ed. p. 634, 637. But it is unnecessary to determine that question, because the streets were not made or dedicated till after the letters patent. The right of market could only be exercised if the grantee obtained a grant from the owner of the soil, and it is for the respondent to prove that grant. There can be no presumption of a private grant of the right to hold the market

(1) 22 Ch. D. 306.
(2) 2 Sm. L. C. 8th ed. 142.
(3) 4 E. & B. 860.
(4) 8 C. & P. 757.

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on a highway: *Morant* v. *Chamberlin* (1). The expressions of Lord Selborne in *Great Eastern Railway Company* v. *Goldsmid* (2) shew that the question raised in the present appeal was in that case left quite open for future consideration. The true view of the contemporaneous facts and documents is that the right of the public to the streets was established before any right to obstruct by waggons &c. The respondent must therefore fall back on user, and user is not enough to justify his acts, because there being no dedication by deed the right of way must have been gained by the public before the right to stop carts for selling could be exercised, and no user can give such a right on a highway.

The letters patent of James II. having been held void by the Court of Appeal in *Goldsmid* v. *Great Eastern Railway Company* (3), it follows that even if the respondent has the right he claims on Thursday and Saturday he has not on the other days, and the appellant is therefore entitled to an injunction to restrain him on the other days of the week.

[EARL OF SELBORNE:—The injunction claimed is a general one: no distinction is made in the statement of claim as to any particular days of the week. The appellant cannot now set up such a case.]

[They also argued that even if the respondent had proved market rights over parts of the outer streets the evidence shewed that those rights had been exceeded.]

Littler Q.C. *Crossley* Q.C., and *J. M. Solomon* for the respondent were not heard.

EARL OF SELBORNE:—

My Lords, your Lordships would have desired to hear the counsel for the respondent if it had appeared to you that it was necessary upon the issue between the parties in this cause to determine any question either as to the precise position of the right of property in any part of these streets, or as to particular limitations or distinctions of place within the streets, affecting the manner in which the market rights may be exercised. But

(1) 6 H. & N. 541.
(2) 9 App. Cas. 943.
(3) 25 Ch. D. 511, 538, 546, 557; 9 App. Cas. 927.

in the view which I take of the issues upon which these parties came into Court, those are questions which have not to be determined in this cause, and as to which it was not necessary that evidence on the part of the respondent should be given more distinct than the certainly meagre evidence which alone under the circumstances of the trial he actually gave.

Now what is it that the appellant comes into Court undertaking to prove? This and nothing but this. In his statement of claim he plainly takes his stand upon the rights vested in the Whitechapel District Board in respect of public streets by certain Acts of Parliament which he sets out in the outset of his case; and, having so shewn by what title and for what purposes he seeks the interposition of the Court, he then states his case as against the defendant. He says in the 5th paragraph: "The defendant claims to be the lessee of the Spitalfields Market" and so on. In the 6th paragraph he makes a definite allegation as to "the limits of the said market," in substance exclusive of any parts of these streets, and he not only excludes them by a description of the limits of the market, but he does so in express words: "In particular the said market does not include the said streets" (mentioning the internal streets, as they have been called, and the external streets surrounding the market buildings, by their names), "or any of such streets, or any other street more distant than the above from the central buildings. Any user of such streets or of any such streets by the lessee of the said market or his licensees inconsistent with the provisions" of what I may call the Commissioners' Acts "is a wrongful user and in fact a public nuisance." Then in the 8th paragraph he says: "All the streets particularly mentioned in the last paragraph are and always have been public streets and are not subject to any right of user as a market." Your Lordships will observe that in those passages the point taken is that the streets are wholly excluded from all market rights whatsoever; no distinction is suggested between one part of the street and another; that which is to be proved is, that the market does not extend at all into any of those streets.

Then the statement of claim goes on to say, in the 9th paragraph, "that the defendant since he became such lessee as

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aforesaid has endeavoured to extend the area of the said market by encroaching upon the public streets," in a way which is a public nuisance. And the 10th paragraph says, that he "has of late years personally and by his agents, caused, permitted and suffered, and given leave and license, and it is now his constant practice to cause, permit and suffer and give leave and license, to various persons to set, place, and expose to sale various marketable articles and things" "on certain of the said roads or streets;" naming them again, and making no distinction as to the place, "and has claimed and enforced payment of tolls, fees, and rents from the persons so doing." Paragraph 11 says that he has in like manner, (equally without distinction as to the particular parts of the streets in which he has done it,) "given leave and license to various persons to set or place blocks, forms, stools, benches, and stalls, in or upon such streets, and also to draw up, and leave on the said roads and streets, and the pavements thereto belonging, carts, waggons, drays, wheelbarrows," and so on.

Those are the allegations of fact, upon which the prayer for an injunction against a nuisance by doing those things is founded. There is no allegation as to any excess of market rights by particular acts in particular portions of these streets, if there are any market rights in those streets at all.

The defendant in his statement of defence says, that the market estate of which he is the lessee extends not only over the area mentioned in the statement of claim but also over half of the surrounding external streets. He says that he has granted licenses of the kind mentioned and taken tolls in respect of them; but that, so far as the standing of carriages and the licences for them are concerned, (to which he does not limit his rights by any means,) he has done it only within what he describes as the limits of the market estate, including one-half of those different external streets and the whole of the internal streets. That particular right he only claims within the limits of the estate. But the precincts of the market, according to him, extend further. So far as relates to the receipt of tolls for the use of the market they extend, according to his view, certainly over the whole of those streets, possibly even further. How-

ever far they may be extended consistently with his right, he claims that right, and he says that he has exercised it; because, in the 12th paragraph of the defence, which was referred to by Mr. Colt, he says "that he has demanded and received, and if necessary, by lawful means, but not otherwise, enforced tolls and rents from all persons selling marketable articles within the market estate" (that is, as he defines it), "and has also on some occasions received tolls and rents or payments in the nature of tolls or rents from persons selling marketable articles in the immediate proximity of the market estate and within the precincts of the market." In other words, his claim is to exercise his market rights, some of them within the precincts of the market estate, which he says extend over half of those external streets and over the whole of the internal streets, and as to others beyond the limits of the market estate, and (I will for the present purpose assume, consistently, I think, with the pleadings on both sides,) at all events over any part of those four external streets.

That being the state of the pleading, and the issue taken thereupon, the question is, first, What is the position of the burden of proof? Now the original burden of proof lying upon the plaintiff, the Attorney-General, is simple enough. He stands upon his Acts of Parliament and he says that those acts which have been committed, unless justified, are nuisances. But they are justified, if it is shewn that the market privileges do extend into these streets. That being the allegation, evidence is given to shew that. The defence is, that as to certain market rights and privileges the defendant exercises them and has exercised them only within definite limits, including part of the streets which he says belong to the market estate, and that with regard to others he claims them over a larger area. If evidence is given in support of that allegation, shewing that within these streets market rights have been exercised, but evidence not directed to distinguishing with accuracy the precise part of each street in which the particular exercise of the market rights spoken of by each witness took place, that is evidence which goes against the general case made by the information quite sufficiently; and if it may not enable the Court to say distinctly from that evidence that the defendant has exercised

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those rights within this or that part of this or that street, then, if it was meant after that evidence, and after that pleading, to say, "You have gone beyond your own claim, you have done specific acts in excess of your claim; you have authorized carts and carriages to stand beyond those parts of the streets which you allege to be the market estate,"—if that were thought material in aid of the case of the Attorney-General—surely it was for him and not for the defendant (the respondent), to enter into those distinctions; and, there having been no attempt on the part of the Attorney-General to say that there has been such an excess, I think your Lordships ought not to infer that there has been any such excess. Therefore, you must treat the case as depending upon the broad issue, which is the only issue really submitted to your consideration, viz., whether the market rights extend to these streets or not.

Upon that subject I think that the evidence is meagre. But why is it meagre? Three or four witnesses were called by the Attorney-General (two I think were salesmen), and one of them, as far as his evidence went, distinctly proved that in Commercial Street, before it acquired that name, when it was Red Lion Street, there was a user by the then market owners in accordance with the claim as stated by themselves, that upon that side of the street which they say is within the market estate they did give licenses to his knowledge, for the standing of carts for market purposes, and received payment for doing so. That is part of the Attorney-General's own evidence, he calling very little evidence indeed bearing upon that part of the case.

Then three old men are called on the part of the defendant, and their evidence, taken alone, is loose, and not very strong as to the facts which they mention or the particular places where the acts to which they bear witness were done. But I think the fair construction of what they do say is consistent (to say the least) with the manner in which the right is claimed by the respondent. That evidence having been given, and there being in it some evidence most distinctly of the user of market rights as long as those witnesses remember in these streets, and some evidence also of the particular place and mode of user in conformity with the allegation of the defendant,—although if that were all the

evidence which the defendant had to tender it might have seemed too slight to found conclusions upon,—yet the learned judge stops the case and says: "I will assume that you have got any number of old witnesses who will come forward and give the same kind of evidence;" in other words, that all those particular parts of the evidence which tended to shew user of these streets or parts of them for market purposes might have been multiplied to any extent, and credited. Then the Court of Appeal appears to have thought that it ought to treat the case not as having the actual evidence only within its actual meagre limits, but as proceeding upon the admitted basis—that such evidence as that, going as far as any parts of that evidence do go, to prove the exercise of market rights in these streets, might have been multiplied ad libitum, and that there would have been no answer. If that is so I agree with the Court of Appeal in thinking that it is evidence of user extending as far back as living memory could go, absolutely inconsistent with the case made by the information that the market rights do not extend over any portion of those streets. Considering what took place at the trial, I cannot think that, in this respect, the Court of Appeal was wrong. If the market rights do extend over portions of these streets then I fail to find in any evidence which has been given anything which shews that they are being exercised in a manner which, consistently with their existence, is a public nuisance or contrary to those Acts of Parliament which are referred to; and therefore in the result I have no doubt that the information has been properly dismissed.

But it is said that, upon the facts which are known, notwithstanding the user within living memory of the kind which I have mentioned, proved by any number of witnesses, still that is not enough; because these are public roads, and there is a competing right between the public and the market owner, and the burden of proof is upon the market owner. I agree that the burden is on him; but the question is whether by this evidence of user coupled with "the commencement of proof," (if I may borrow an expression translated from the French jurists) which is found in the documents, the defendant has not sufficiently established the existence of a right to do the things which within living memory have actually been done. Now it seems to me

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that nothing can be more cogent than this, that he produces a charter creating this market in the year 1682, which, speaking of the limited area to which the appellant wants to confine the market rights, distinctly authorizes the holding of a market "in sive juxta" that area. To me it seems perfectly clear, whether you look at the Latin words "in sive juxta" or at their English equivalent, "in or near," that the charter contemplates the extension of the market, if the owner of the market rights should so think fit and should have the means of so doing, beyond that particular area into the area which surrounds it. "Juxta" will at least include all the four external streets which are now in question. As to the internal streets I shall say no more—they are in the market estate itself, and both Courts were agreed as to them; but "juxta," as was admitted by Mr. Finlay in answer to a question put to him, cannot have any effect at all without at all events including the whole or part of those four external streets. Therefore it is plain that the charter, as far as a charter can, authorizes and contemplates the holding of a market in those external streets; and when I say those external streets, it will of course be remembered that the streets did not exist at the time, but the land upon which they have been laid out did. Then it is reasonably probable, that what the charter authorized the grantee of the market rights would desire to do, and had the power of doing if he could acquire the land; it being plainly contemplated that the market, if it prospered, might require more space than would remain after convenient buildings were erected upon the market area, which buildings themselves might be partly for market purposes and partly perhaps for other uses. The presumption certainly is that, this being his right under the charter, subject to any rights of other people to prevent his exercising it where the land belonged to them, he would, in carrying into effect the charter, endeavour to utilise the permission to hold the market "juxta," as well as the permission to hold it "*in*" the site.

But it is said, and said truly:—"So far as the evidence goes we know nothing about the title at that time to the land on which these streets were afterwards made." But what we do know is this, that the original owner of the market area, however

defined, say of the more limited area, the area which is included in the lease of 1672, had other adjoining property, the devolution of the title to which is not in any way whatever shewn, and that such adjoining property not only may have included, but in all reasonable probability did include, the site of these surrounding streets. It was not intended when the lease of 1672 was granted that buildings should be erected upon the land, or at all events not by the lessee Balch; but at the time when this grant was made, it evidently was contemplated between the parties, that it would be for the interest at all events of those who were interested in the land included in the lease, that there should be buildings and a market; for they go to the Court of Chancery and obtain a decree getting rid of the impediments which the terms of the lease had created. At that time, it appears that the lessee had bought up certain aliquot parts of the reversion to the rights in fee, so far at all events as relates to the land included in the lease: and what was the state of the title to any land outside is in no way whatever shewn.

But when we come a few years later to the year 1693, we find by a recital in a deed which was then made, and which is at page 17 of the appendix, that the buildings and the market house had then been erected. It recites:—"And whereas divers messuages, houses, and buildings and a markett house, and divers shopps, stalls, and edifices have lately bin erected and built and are now standing and being in and upon the said ground and hereditaments so leased to the said John Balch and Henry Allen as aforesaid." Looking to the manner in which according to the evidence the ground there referred to is now occupied by a central market with buildings all round and intersected by the four internal streets, I think it highly probable—certainly it is quite consistent with probability and with any reasonable inference from the evidence—that the buildings which had been erected in 1693 were erected upon the plan on which the buildings on the same area now stand, even if they are not absolutely the same buildings, which I think they very possibly may be. If that is so, then the next question is, What was the state of the surrounding ground? We have no evidence to shew at what

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precise time either the four internal streets were made or the four external streets. It is a reasonable inference, I think, that when the ground was laid out for building, the adjoining streets and the intersecting streets were laid out at the same time, or about the same time, and as part of the same plan; and inasmuch as the owners of the ground outside, for anything that appears, might be in one and the same interest with the owners of the ground inside, so far as related to the point of utilising the general building site and utilising this market grant, I think it is consistent with the principles on which presumptions from usage are made, to suppose that the streets were made and dedicated in connection with and for the purposes of the market, with a view to utilise the grant to its full extent and to the whole of its terms; and that the land upon which the streets were laid out had already, by the common consent of all whose consent was necessary, been intended to be used, at all events to the extent of the immediate circle of those four streets, for market purposes. This is not only consistent with the principles upon which presumptions from usage are ordinarily made, but in my judgment it is so consistent with the intrinsic probabilities of this case, and with the surrounding circumstances, that if I had as a juryman to draw an inference of actual fact, and not merely of legal presumption upon legal principles, I should presume it to be the case that these streets were laid out in connection with these buildings, and with this market, with a view to the existence of such a market as the charter contemplated, which is a market "juxta" as well as "in" that site. Nobody comes forward claiming a private right of property in the soil of any of these roads inconsistent with their use for market purposes. Nobody knows who now has that right of property or who had it then, and it is perfectly consistent with the facts which do appear that it might have been acquired by the owner of the market rights. It is perfectly consistent that, if it was not so acquired, it was in the hands of persons whose interest and wish it was to promote the development of the market. It is also perfectly consistent that an agreement might have been made with the market owner that the roads should be made and laid out and dedicated at their common expense, and with the under-

standing that from the beginning the market estate was to be deemed to extend ad medium filum, and that the market might be held as it has been.

That being the origin of the title to the market, and that being the history of the acts which we can trace as done in connection with the market before the roads were dedicated and any public right in them created, and the later evidence as far back as memory goes proving the use of these streets for market purposes, connecting the one with the other, it appears to me to be an irresistible conclusion that what has been done has been done as of right, and consequently that this information has been properly dismissed. I therefore move your Lordships to dismiss the appeal with costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion. I think it as well to say that I do not conceive that this House is deciding anything more than that this information, as it stands, is properly dismissed. There is really a great deal that is conjectural one way or another, which I do not think it is very satisfactory to act upon, as to what was or was not the fact. We must endeavour to see from the evidence what the fact was, as bearing upon the actual question which has been raised. The Spital Fields were, as I take it, in the latter part of the reign of Charles II. and in the reign of James II. really what the name implies, that is to say, open fields. Who were the owners of them I do not know. How far there had been any population growing up upon them I do not know. But it does appear that in 1672 there was a lease made for eighty years of a portion of the ground to a person of the name of Balch. It appears from the Chancery suit that this Balch was the lessee of a portion of the ground which he seems to have called "Spittle Square"; he held it subject to a covenant not to build upon it. He bought up the greater part of the reversion of this piece of land of which he had an eighty years' lease; and when that was the state of things he obtained the first grant from Charles II. to hold a market "in or near Spittle Square."

Now the first question is, What is the meaning of that?

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Balch certainly not being the freeholder of the whole of the land but having a portion of the freehold and having this lease, what is the effect of this grant? If I thought, as Stephen J. seems to have thought, that it was essential to make a grant of a market good that it should be granted to a person who had actually got the freehold, the fee simple in the land, or even had got an interest in the land, it would have been another matter; but I am not aware of anything of the sort. A franchise is granted which gives to the person to whom it is granted the right to exercise it if he can, and it also gives him the right, if he has done nothing to forfeit it, to hinder other people from interfering with this franchise. Well, he gets that right of market which has been granted to him and his heirs and assigns; it is not attached to any particular man personally. He cannot utilise that grant unless he can get upon the land in some way to do it, but he may do that in any way he can. If, a person having got a grant of market, the owner of the land says "I will not give you the fee simple of the land, I will not part with it to you, but I am perfectly willing that you shall exercise your market rights upon my land and I will let it to you for that purpose," I know of no principles of law and I know of no authority to say that he may not do so, and that the market franchise would not in that case be exercised well enough as long as that state of things continues.

Again, you cannot practically hold a market, you certainly cannot exercise your rights of market, unless people have some means of access to come there. It does not follow at all from that that their means of access to come to the market are to be public ways. I have no doubt that a market might exist, and I have very little doubt that it sometimes did exist, in which a right having been granted to a person to hold a market the lord of the market said to the public:—"On the particular days when the market is held I will let you walk over my land, but on the days when the right of market is not exercised I will lock up the doors and not let you in: there is no reason why I should let you in." Still it is very convenient where there is a market to have public rights of way to that market.

That being so, Balch having got this right of franchise of

market expected no doubt to carry it out; but a few months afterwards he unexpectedly died, leaving one infant, a little girl about four years old. He had not expected to die whilst these matters were in an incomplete state, and then there was extreme difficulty in working them out. The parties went to the Court of Chancery and made sufficient recitals to shew the state of things, and they got a decree saying that it was for the interest of everybody that the infant should not be hampered by the covenant not to build upon this ground, but should be released from that covenant. What was the state of things after that I do not know; but it is evident from the charter of James that the estate of Balch had come to the person who was the grantee under the second charter, George Boun. I should conjecture, if I might make a guess, that the little girl had died an infant. But that being so, the natural and sensible thing would be that those who were going to start the market would do what would be convenient. They would put the market in the place described and would take as much property round it as they thought was necessary or convenient for the purpose as being near the place, if they could acquire that property, and upon that they would begin to exercise their market rights "in or near."

I do not quite agree with what the Master of the Rolls seems to intimate, that where there are such words as these, viz. that you are to have your market right "in or near" a place, inasmuch as the market may increase in magnitude you can go on extending your market continuously. I do not say that that may not be so, but I do say that I am not aware of any authority to that effect. It seems a strange thing to say that in the case of Covent Garden Market the right of the Duke of Bedford to hold the market might extend actually into the Strand, and even into Piccadilly, by an enormous increase of the market. Certainly I am not going to say that that is so. But when the market owners had started the market and had begun to hold it (supposing they did so) in the place which was dedicated to be a market, and in the streets and ways which were not yet dedicated to the public but which were laid out and which are now called North Street, South Street, East Street and West Street, and upon a portion of the streets surrounding them, I say assuming that to be the fact

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and that they had begun to hold a market in those parts of the land, if the owner in fee simple, whoever he was (whether the owner of the market was or was not jointly an owner of the fee simple of the surrounding land) makes a bargain and says: "We will dedicate these lands; you the lord of the market have got a right to do this upon this portion of the land, but we will join now in dedicating that portion of the land to be a public way from this time for the future," they had a perfect right to do so, but subject to the right which the lord of the market had already acquired (assuming he had done so) to use it for a market, particularly the right of stallage, the right to charge a person for holding a stall. If they did create a right of way, I do not see how they could create a right of way which would take away that which the owner of the market right had already acquired, but I do not see why they should not create a right of way subject to that.

Now, as the noble and learned Earl has pointed out already, the question upon which issue is joined on this information is really this: The assertion upon the Attorney-General's part is that Horner, the defendant, has stopped up all the streets round, principally in this way, that he has licensed and caused persons to come with carts and waggons on the public highways, and stopped them where the public had a right of way, and that he has done this under colour of doing it in the exercise of his right of market. The answer which is made is: "I have not done anything of the sort except in the narrow part, in those four streets, North Street, South Street, East Street and West Street, and a portion of the external streets. I have done that to some extent but only to the extent to which I was justified in doing it, namely these being part of the market I have made my stallage there." The burden lay entirely upon the Attorney-General to shew that he had done more than that. No evidence whatever has been called to my attention to shew that Horner has in any way done anything to block the streets up except in the particular parts which in his own defence he says he had a right to use in that way.

Then what proof could be given that the market right created by or subsequently to the charter of Charles II. (for it is quite

absurd to talk in the present case of any presumption that there had been a market right from time immemorial) extended to the streets in question, and that the rights of way were subject to that limited right which the defendant has got? How could that be proved in any way except by shewing that in modern times as far back as he could go people had acted as if it had been so? That is what was sought to be proved. The defendant called some old people to prove it; they did not prove it so completely as I could have wished, but he was stopped in giving that evidence. I confess that I do not see why he was stopped. Looking at the shorthand writer's note of the evidence I can perfectly understand that it would have been a reasonable request to make to both sides, "Pray consider distinctly what you want to prove and confine yourselves to proving that;" but why the defendant should be stopped when he had a number of old men to call to give evidence of user I do not understand; I do not know what the ground for doing it was. In the result there was nothing proved against the defendant's statement and there was some evidence in favour of his statement, though not so much probably as there might have been if it had not been stopped.

I quite agree with what has been said by the noble and learned Earl, that the result is that the appeal ought to be dismissed. I do not go further than saying that this information was properly dismissed.

LORD WATSON:—

My Lords, I concur, and I have nothing to add.

Order appealed from affirmed, and appeal dismissed with costs to be paid by the relators.

Lords' Journals 18th December 1885.

Solicitor for appellant: *Alfred Turner.*
Solicitor for respondent: *Edward Betteley.*

[PRIVY COUNCIL.]

J. C.* 1885 Dec. 9, 10.

THE COLONIAL BANK . . . . . PLAINTIFF;

AND

THE EXCHANGE BANK OF YARMOUTH, NOVA SCOTIA . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Payment of Money by Mistake—Liability to refund—Privity.

The plaintiff bank being under instructions from R. to remit his moneys to a bank at Halifax, through the mistake of its agents paid them to a New York bank for transmission to the defendants, who on being advised thereof debited the N. Y. bank, and credited R. in account with the amount thereof, and being afterwards advised of the mistake claimed to retain and use the moneys in reduction of R.'s account with them:—

Held, that on being advised of the mistake the defendants were bound to repair it, and that the plaintiff bank had a sufficient interest in the moneys to recover them as moneys received to their use.

APPEAL from a judgment of the Supreme Court (March 31, 1884).

The order of that date set aside a verdict which had been entered for the appellant, and directed a new trial.

The facts are stated in the judgment of their Lordships.

The ground upon which a majority of the Supreme Court proceeded in making the order appealed from was, that "although the defendants have received the money through a mistake, and although it may be against conscience and against justice that they should retain it, if indeed they are allowed to retain it, the plaintiffs are not the parties to recover."

Cohen, Q.C., and *Arbuthnot*, for the appellants, contended that the money sufficiently belonged to them for the purpose of maintaining this suit (see *Milligan* v. *Wedge* (1), and that it was received by the respondents to their use. The respondents

* *Present*:—LORD MONKSWELL, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) 12 Ad. & E. 737.

could not after notice of the facts appropriate the money to their own use; they were bound to repair the mistake under which they had received it: see *Moses* v. *Macferlan* (1); *Cobb* v. *Becke* (2); *Freeman* v. *Jeffries.* (3)

Grantham, Q.C., and *Bray*, for the respondents, contended that the appellants were not entitled to sue, for that as between them and the respondents the latter had the better title to the money. There was no privity between them, and without privity the action for money had and received does not lie. The money does not and never did belong to the appellants. They were merely the hands through which it was transmitted. The respondents cannot be decreed to pay it to the wrong person. Rogers was the right person to sue, and his remedy would have been against the appellants for negligence in sending the money to the wrong person: *Hill* v. *Royds* (4), *Sims* v. *Brittain* (5), *Freeman* v. *Jeffries.* (6)

The appellants were not called upon to reply.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The question in this case is whether the sum of $3000 in dispute was received by the defendants under such circumstances that they are to be held to have received it to the use of the plaintiffs, the plaintiffs being the appellants and the defendants the respondents in this appeal. The plaintiffs have to shew that the money was not received by the defendants to their own use; that there was privity between them; and that the plaintiffs occupied such a relation to the defendants that they are entitled to recall the money out of the defendants' hands into their own.

That the money was received by the defendants, not to their own use, but by mistake, is a matter not now disputed. For the decision of the other questions it is necessary to state at some little length the material facts of the case.

(1) 2 Burr. 1010.
(2) 6 Q. B. 930.
(3) Law Rep. 4 Ex. 197.
(4) Law Rep. 8 Eq. 290.
(5) 4 B. & Ad. 375.
(6) Law Rep. 4 Ex. 189.

J. C. 1885 COLONIAL BANK v. EXCHANGE BANK OF YARMOUTH, NOVA SCOTIA.

The firm of B. Rogers & Son were doing business at Yarmouth, in Nova Scotia. One of the partners, Mr. Joseph Rogers, did the financial part of the business, and for the purpose of the present case the acts of Joseph Rogers alone may be considered. On the 21st of April, 1879, Rogers wished to remit some money to the branch of the Bank of British North America at Halifax, and he had goods on board a ship which was then making its way to the island of Antigua. He desired to make those goods the means of his remittance to Halifax, and he telegraphed to McDonald & Co., his agents in Antigua, in the following terms:—"When *Pronto*"—that is the name of the ship—"arrives, cable funds Bank British North America (Halifax)." McDonald & Co. had dealings with the Plaintiffs' bank in Antigua, and had a credit there. When the *Pronto* did arrive and Rogers' goods were sold and the funds realized, Mr. McDonald found that there was available $3000 for remission to Halifax. He repaired to the plaintiffs' bank, and on the 6th of May, 1879, instructed them to make the remittance. But his instructions were in these terms:—"Draft on New York in favour of Bank British North America. Draft for Rogers credit Yarmouth." Unfortunately Macdonald omitted the direction to transmit to the branch bank at Halifax. That proved to be a very serious omission. Instead of that, he gives the rather ambiguous instructions contained in the words:—"Draft for Rogers credit Yarmouth." He put the plaintiffs' bank in funds to the extent of $3000, and left them to carry out those instructions.

It may be mentioned that at that time there were current certain bills drawn by an Antigua firm, Messrs. Perot, on Rogers, accepted by Rogers, and discounted by the plaintiffs' bank. The plaintiffs had sent the bills to the Halifax branch of the Bank of British North America for collection. Rogers states that the remittance made by him to the Halifax branch was for the purpose of taking up those bills, and that he so informed Mr. Murray, the manager of the defendants' bank. But the plaintiffs did not rely in any way upon that, and their Lordships are disposed to concur with the arguments presented to them by Mr. Grantham and Mr. Bray to the effect that the plaintiffs' case is not in any way strengthened by the circumstances that those bills were

current, and that Rogers may have had intentions in his own mind of applying the $3000 dollars, or whatever were the proceeds of the *Pronto* cargo, to the taking up of those bills.

The plaintiffs proceeded to act upon McDonald's orders. Their agents in New York were the firm of Maitland, Phelps & Co., and the plaintiffs possessed funds in the hands of that firm. On the same 6th of May they telegraphed to Maitland, Phelps & Co. in the following terms:—"Pay against receipts to the Bank of British North America Rogers credit Yarmouth $3000 dollars. Advise them of the credit." Those are precisely the terms of the instructions which McDonald gave to the plaintiffs, and so far the plaintiffs are acting within their instructions.

But on the 8th of May Maitland, Phelps & Co. proceed to carry into effect the plaintiffs' instructions to them, and here again a serious mistake occurs. They put the New York branch of the Bank of British North America in funds by giving them a cheque for $3000 dollars, but they instruct them wrongly. The instructions appear in the form of receipts, but nevertheless they are instructions from Maitland, Phelps & Co. to the Bank of British North America. First they frame a receipt by which the Bank of British North America are made to say that they have received from Maitland, Phelps & Co.—"Agents Colonial Bank of Antigua the sum of $3000 for account Yarmouth Bank, credit of Rogers." Now there Maitland, Phelps & Co. take upon themselves to introduce a Yarmouth bank of which McDonald and the plaintiffs had said nothing.

When they tender those instructions to the Bank of British North America they are told that there is no Yarmouth branch of the Bank of British North America, and the Bank of British North America in New York desire more specific instructions for the purpose of transmitting the funds to Yarmouth. Those they get in the form of an amended receipt, which runs thus:—"Received from Messrs. Maitland, Phelps & Co., Agents Colonial Bank of Antigua, the sum of $3000 for account of Exchange Bank of Yarmouth credit of Rogers." It seems the Bank of British North America had correspondence with the Exchange Bank of Yarmouth, and they conceived that was the proper way of remitting the funds to Yarmouth: but by reason of that

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departure from the instructions which McDonald gave to the Plaintiffs, and the Plaintiffs gave to Maitland, Phelps & Co., the $3000 found their way, not by any cash payment but by means of credits, into the hands of the Exchange Bank of Yarmouth.

On the same 8th of May a letter was written by the New York bank to the Defendants' bank at Yarmouth, which was in these terms:—"Your account is credited, $3000 payment by Maitland, Phelps & Co., advised from Colonial Bank Antigua account Rogers." That letter arrived on the 13th of May, and was the first intimation that the defendants' bank had that this money was placed to their credit at all.

Now comes the question what they did with it. Rogers was a customer of theirs, and was considerably in their debt at this time, so they put the amount to the credit of Rogers, and to the debit of the Bank of British North America; and in the then state of their knowledge that was a perfectly right thing for them to do. But nothing more was done than that. There is some mention of a dishonoured acceptance, to the payment of which they say they appropriated the fund; but nothing was done except by private entries made by the defendants in their own books. The same day on which they received the notice of this credit they learnt from Rogers that a mistake had been made—in fact, that the money ought not to have come to their hands; and all he tells them then is that he will see to it. There is some discrepancy between Murray and himself as to how much he told them, but it is sufficient to say that they then had notice that a mistake had been made.

On the next day, the 14th of May, the Bank of British North America in New York, having been advised through Rogers of the mistake, telegraphed to the defendants as follows:—"Pay by telegraph to Bank of British North America, Halifax, for account B. Rogers & Son, the $3000 advised in my letter 8th of May." Therefore on the 14th of May the Defendants know that the money ought to have gone to the Bank of British North America, Halifax, instead of coming to themselves. But all they do is to telegraph back "$3000 credit B. Rogers & Son used; cannot recall."

Simultaneously with the telegram the Bank of British North

America write a letter which reaches the defendants' hands on the 19th of May. That letter tells them the whole story; it is as follows:—"At 1.30 P.M. to-day" (the 14th) "we telegraphed you my advice, $3000 for credit of B. Rogers & Son, 8th of May, should have been to Bank of B. N. A., Halifax. Stop payment and telegraph us that you have done so. And at 4 P.M. we received your reply:—'$3000 credit, B. Rogers & Son are used, cannot recall.' Our telegram was sent at the request of Messrs. Maitland, Phelps & Co., who were in receipt of the telegram from B. Rogers & Son, stating that the amount should have been remitted to our Halifax branch, which we now presume they have done from Yarmouth." In answer to that letter the defendants write:—"B. Rogers & Son are in difficulty. The amount, $3000, advised in yours 8th instant, was used to retire their draft, $600, being under protest. Will you be so good as to send me the exact instructions received by you from Maitland, Phelps & Co., under which you acted in your advice of the 8th instant?" The Bank of British North America sent for answer—"Maitland's instructions were:—'Pay Bank of British North America Yarmouth account Rogers.'" This version of the instructions was not verbally correct; but so far as concerned the defendants, it shewed them, correctly enough, that Maitlands received no instructions in their favour. At that time therefore, when that letter reached, probably on the 26th of May, the defendants knew the whole story. They knew exactly how the mistake arose, and what was necessary to put it right. But all the answer they return is:—"The matter stands as stated in my telegram of the 14th ultimo;" which means that the sum paid in has been used, and it cannot be recalled.

Now it was not true that the sum had been used and could not be recalled. The defendants had only got to run a pen through some private entries in their own books and the matter then would have stood in precisely the same position as it stood in before the mistake was made. They had not in any way altered their position. They would not, if they had cancelled the entries, have been in any way damnified by the mistaken payment made to them. Mr. Murray, the agent of the bank, in his evidence endeavours to shew that their position would have been altered

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for the worse by the mistake, but he gives a reason which to their Lordships is wholly unintelligible.

What then was the duty attaching upon the defendants? Clearly their duty was, directly Rogers informed them of the mistake, to learn the nature of the mistake, and take care that they should be in a position to rectify it. At that moment they would have been quite justified in not paying to the Bank of British North America without seeing that they had the authority of the persons from whom the money came to them; but within a few days, as we have seen, the authority did come from all the persons whom the defendants knew in the transaction. They were asked by the New York branch Bank of British North America, in communication with and by the desire of Maitland Phelps & Co., who are the agents of the Plaintiffs, and also asked by Rogers to whose credit the fund was to be carried, to pay the fund to the Bank of British North America in the Halifax branch. They therefore had the request of the whole of the parties whom they knew in the transaction to rectify the mistake, and instead of doing it they rest upon what their Lordships find to be the false allegation that the money had been used and that it could not be recalled. On that false allegation they have retained the money up to the time when this suit was instituted.

Now they raise other objections. In the first place it is said there is want of privity, and certain cases have been cited in which, although the defendants may have been wrongfully possessed of money, yet the plaintiffs could not recover. But in those cases there was no payment made direct from the plaintiffs to the defendants. In this case there is such a payment. The defendants had no knowledge of their receipt and possession of the funds, except by the letter which tells them that those funds came from the Colonial Bank through their agents Maitland, Phelps & Co. There is therefore the most direct privity between the two parties.

Then it is said that the plaintiffs have no interest to recover the fund because they were originally set in motion by Rogers who paid them. But if it were only to relieve themselves from all questions about the mistake that their agents made in New York, and to relieve themselves from liability to be sued for the

whole consequences proceeding from that mistake, the plaintiffs would have an interest to recover the money. They were told to convey the money to a certain quarter. They, through their agents, were the authors of the mistake by which it went to another quarter. It seems a perfectly untenable position to say that an agent in that position has not got an interest to recall the money, so that it may be put into the right channel. If the money had been repaid by the defendants directly they found they were not entitled to it, it would have got into the right channel. Whom it would ultimately have benefited there we do not know. It is foreign to this action, and we are not bound to speculate upon it. The question is whether the plaintiffs are not entitled to demand that that money should be recalled and put into the channel in which it was originally intended to be put.

The result is this, that on the 13th of May, 1879, when the defendants were told that a mistake was made, an equity was fastened upon them not to alter the position of the fund until the mistake could be repaired; and on the 19th of May, 1879, when they knew exactly how the mistake was made, and how in the opinion of all parties to the transaction they could repair it, they were bound to repair it. If the parties having an interest in the fund had differed and quarrelled among themselves, then it might have been the duty of the defendants to place the fund in medio and bring it into Court, or to set it aside and hold it as stakeholders—not to appropriate it to themselves. But in point of fact if they had paid the Bank of British North America at that time all parties would have been satisfied. If they had insisted on restoring it to the persons from whom it came to them—that is the plaintiffs—all parties would have been satisfied, because then it would have reached the quarter for which it was originally intended. Instead of that, they have got an interest in keeping it, and they choose to keep it for themselves. They cannot do that. The original equity subsists up to the present moment. The defendants must be tried now by inquiring what was their duty on the 19th of May. Their duty then was to pay either to the plaintiffs or, at the request of the plaintiffs, to the Bank of British North America. They have not chosen to do that, and therefore they have exposed themselves to this suit by the Plaintiffs.

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Their Lordships think that the verdict, and the maintenance of that verdict by the Supreme Court sitting as a Division Court, were perfectly right, and that when the matter came before the Supreme Court on review, they ought to have dismissed the defendants' application with costs.

Thir Lordships will humbly advise Her Majesty now to make a decree to that effect. The respondents will pay the costs of this Appeal.

Solicitors for appellants: *Druces, Jackson, & Attlee.*
Solicitors for respondents: *Hill, Son, & Rickards.*

[HOUSE OF LORDS.]

THE LOCAL BOARD FOR THE DISTRICT OF ACTON, MIDDLESEX . . . . . } APPELLANTS;

AND

HENRY ARCOURT LEWSEY . . . . RESPONDENT.

H. L. (E.) 1886 March 8.

Local Government Acts—Public Health Act 1875 (38 & 39 *Vict. c.* 55) *s.* 150—*Paving of Streets—Notice to pave in a specified Manner—Validity of Notice.*

Under s. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55) an urban sanitary authority gave notice to the owner of premises to pave part of a street upon which his premises abutted, specifying the materials and mode and (inter alia) requiring him to lay down concrete. The owner having failed to comply, the sanitary authority did the work themselves, but finding that the concrete would be an unnecessary expense, omitted it:—

Held, that the omission to follow strictly the terms of their own notice did not prevent the sanitary authority from recovering from the owner his proportion of the expenses incurred.

APPEAL from a decision of the Court of Appeal.

The appellants having brought an action against the respondent in the County Court at Brentford, the learned judge stated a special case, of which the parts material to this report are as follows:—

The plaintiffs are the urban sanitary authority for the district of Acton, Middlesex, and the defendant is the owner of premises abutting on Cowper Road in the district.

The plaintiffs duly gave notice under sect. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55) to the defendant, reciting that Cowper Road was not levelled, paved, metalled and made good to the satisfaction of the board, and requiring him to level, pave, metal and make good the part upon which the defendant's premises abutted. The notice set out in detail the works to be executed, and (inter alia) required concrete to be laid for the footway, and over it tar paving. The notice required "the whole of the above-mentioned works to be executed by you in accordance with the plans and sections of the works as prepared by the surveyor to the board, and now lying for inspection at the office

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of the board, and the dimensions, widths and levels shewn thereon; and to be done in a good, workmanlike and substantial manner to the satisfaction of the board or their surveyor."

The defendant not having executed the works, the plaintiffs thereupon executed the works themselves in manner specified in the notice and the plans and sections there referred to, except that they did not put down the concrete under the tar paving which by the plans was specified to be there placed. The concrete was omitted because on proceeding with the excavations it was discovered that the foundation was good.

Of the expenses incurred by the plaintiffs in executing the works (no sum being charged in respect of the omitted concrete) the sum of £24 5*s.* was duly apportioned, under sect. 257 of the Public Health Act 1875, to be paid by the defendant in five annual instalments. This action was brought to recover the first instalment with interest, viz., £5 1*s.* 9*d.* The learned judge gave judgment for the plaintiffs.

The principal question raised by the special case was whether the jurisdiction of the board applied to the locus in quo, but the only question material to this report was whether the county court judge was right in deciding that the omission of the concrete did not prevent the plaintiffs from recovering.

The Divisional Court (Mathew and Day JJ.) affirmed the decision of the county court judge. The Court of Appeal (Brett M.R. Cotton and Lindley L.JJ.) were of opinion that the omission of the concrete did not prevent the plaintiffs from recovering, but upon the principal question held that the defendant was not liable, and reversed the judgment. From this decision the plaintiffs appealed.

Feb. 8, 9. *Arthur Charles* Q.C. and *Pollard*, for the appellants argued the principal point, but were stopped upon the question of the omission of the concrete.

The respondent, in person, contended (inter alia) that the board having failed to comply with what their own notice required the respondent to do, namely, lay down concrete, he was not liable for any expenses so incurred by the board, the words of sect. 150 of the Public Health Act 1875 being "If such notice is not

complied with, the urban authority may, if they think fit, execute the works mentioned or referred to *therein;* and may recover" the expenses &c.: that the words of the section ought to be read strictly and not extended: that the board should either have complied with their own notice, or treated it as invalid and given a new notice.

[LORD BRAMWELL:—Is there any power under the Act to require the owner to pave in any particular way, or to do more than to pave to the satisfaction of the board?]

THE HOUSE took time for consideration, the appellants' counsel not being heard in reply.

Mar. 8. LORD HALSBURY:—

[After disposing of the main question in the case and deciding that the judgment of the Court of Appeal ought to be reversed upon it, proceeded thus:—]

The only remaining question is one which, assuming Mr. Lewsey's liability to do what the local board ordered, turns upon whether the local board adopted the proper procedure for the purpose of enforcing that liability. Now the power given to the local board is to call upon the adjacent owner to pave, and to pave to their satisfaction. It would, I think, be a very unreasonable exercise of this power by the local board if they were simply to call upon the adjacent owner to pave, and leave him without guidance or direction as to what paving would be satisfactory to them.

When the owner refuses or neglects to pave in pursuance of the requirements of the local board, an obligation is cast upon that body to cause the work to be done, and to charge the owners with the cost. It would, I think, be an abuse of the power so conferred, if the local board did not procure the work (and it must, of course, be substantially the same work) to be done as cheaply as possible. If it were otherwise, the local board would have to protect itself by calling upon adjacent owners to do expensive paving in order to insure that it should be satisfactory paving, and if no discretion in the execution of the work were to be implied, they must, under penalty of forfeiting all right to

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recover for the expense of paving at all, insist upon every item of expenditure, although in the progress of the work it might turn out, as in this case, that a portion of it might be useless expense. Such a construction of the statute appears to me unreasonable, and therefore not to be adopted unless no other is possible.

I think the judgment of the Court of Appeal should be reversed, and the respondent should pay the appellants' costs, both here and below.

LORD WATSON concurred.

LORD BRAMWELL :—

My Lords, I also agree in what has been said by the noble and learned Lord on the woolsack upon the main question.

As to the other point it has been sufficiently dealt with by my noble and learned friend. But I desire to add that upon the point which occurred to me,—and which was not taken till it was taken here by me—namely, that the board had no right to order the way in which the work should be done, I still have sufficient doubt to recommend local boards, when they do give orders that work shall be done, not to prescribe the mode in which it shall be done, but to content themselves with saying that if done in a particular way it will be satisfactory to them.

LORD FITZGERALD :—

My Lords, I concur in the judgment and have nothing to add.

Order appealed from reversed, with a declaration (inter alia) that the omission of the concrete did not prevent the plaintiffs from recovering. The respondent to pay the appellants their costs in both Courts below and also the costs of the appeal to this House. Cause remitted to the Queen's Bench Division.

Lords' Journals 8th March 1886.

Solicitor for appellants: *Alexander Helmsley.*
Solicitors for respondent: *Sandom, Kersey, & Knight.*

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THE DENABY MAIN COLLIERY COMPANY, LIMITED . . . . . } APPELLANTS;

AND

THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY . . . . . } RESPONDENTS.

Railway Company—Carrier—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20) *s.* 90; "*Passing only over the same portion of the line;*" "*Under the same circumstances*"—*Tolls, Unequal—Group Rates—Undue Preference—Railway and Canal Traffic Act* 1854 (17 & 18 *Vict. c.* 31) *ss.* 2, 3, 6—*Action for Breach of Railway and Canal Traffic Act* 1854, *s.* 2, *whether maintainable.*

The provision in sect. 90 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), requiring equality of rates for carriage of goods "passing only over the same portion of the line of railway under the same circumstances," applies only to goods passing between the same points of departure and arrival, and passing over no other part of the line. And mere inequality in the rate of charge when unequal distances are traversed does not constitute a preference inconsistent with the concluding words of that section.

Therefore, where a railway company carried coals from a group of collieries situate at different points along their line, and charged all the collieries with one uniform set of rates in respect of such carriage, and the owners of the colliery lying nearest to the point of arrival brought an action for overcharges:—

Held, affirming in this respect the decision of the Court of Appeal, that the railway company had not infringed the provisions of sect. 90 of the Railways Clauses Consolidation Act 1845:

Held, also, that in this case an action did not lie for breach of s. 2 of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), undue or unreasonable preference or prejudice not having being made out.

Quære, whether under any circumstances an action lies for breach of that section.

Where goods are carried for different customers "over the same portion of the line of railway," the fact that the goods carried for one customer are to be shipped to certain ports in order to develop a new trade, or open up new markets, and so to increase the tonnage carried, does not constitute a difference in the "circumstances" so as to justify inequality of rates.

Therefore, where a railway company carried coals over the same portion only of the line to G., both for the appellants and also for B., and allowed B.

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8*d.* per ton in respect of all coal carried to G., and there shipped for the West Indian market; and also allowed B. 6*d.* per ton in respect of all coal carried to G., and there shipped by him to certain ports, in consideration of a bonâ fide undertaking by B. to develop the trade to those ports, to provide the vessels, and to run the risks incidental to the working of such a traffic:—

Held, affirming in this respect the decision of the Court of Appeal, that the coals were carried "under the same circumstances," and that the allowances were breaches of sect. 90 of the Railways Clauses Consolidation Act 1845:

Held also, reversing in this respect the decision of the Court of Appeal, that the appellants were entitled to recover the overcharges by action against the company, the amount to be ascertained by finding what quantity of coal carried under the same circumstances and over the same portion only of the line was charged at the higher rate to the appellants at the time the lower rate was charged to B.

A railway company which carried coals for the appellants and also for B. and J. "over the same portion of their line of railway," and made allowances and a rebate to B. and J., proved that they carried for B. and J. at a less cost to the company, but did not shew that the allowances and rebate were adequately represented by the saving to the company:—

Held, affirming in this respect the decision of the Court of Appeal, that the difference in cost constituted a real difference in the "circumstances"; that there being nothing to shew any want of good faith the company were not bound to prove that the allowances and rebate were adequately represented by the saving; that there was no breach of sect. 90 of the Railways Clauses Consolidation Act 1845; and that the appellants could not maintain an action for overcharges under that section.

APPEAL from a decision of the Court of Appeal (1).

The respondents having brought an action against the appellants for a balance of a carriage account due December 4, 1880, the appellants pleaded a set-off and counterclaim for overcharges for six years prior to December 14, 1880, and claimed 30,000*l.* for overcharges, or alternatively for damages.

The action was referred to Alfred Wills Q.C., with power to state a special case. At the request of both parties on the 18th of April 1884 he stated the following special case.

PART I.

1. The defendants are colliery owners carrying on their business at the Denaby Main Colliery near Doncaster.

2. It is the business of the defendants to raise and sell coals for delivery in different parts of the kingdom and abroad. They

(1) 14 Q. B. D. 209.

deal only in coals raised from their own mines. Their colliery is situated on the line of the plaintiffs' railway and connected with it by sidings. A large portion of their coal leaves their colliery by the plaintiffs' line, from which it passes either along the plaintiffs' line only, or along the plaintiffs' line and thence on to the various lines connected therewith. The defendants' colliery has no direct communication with any other line of railway except that of the plaintiffs. The defendants sell coal at (amongst other places) Great Grimsby (hereinafter called Grimsby), Goole, and Hull.

3. Amongst the customers of the defendants are Mr. Bannister and Messrs. Josse & Co., both of whom carry on business in a large way as coal merchants at Grimsby. Messrs. Josse & Co. also carry on business at Hull and Goole. They buy coal not only of the defendants but of a large number of other owners of collieries both in the South Yorkshire Coal Field and elsewhere. The plaintiffs' railway is the only railway leading from the South Yorkshire Coal Field (in which the defendants' colliery is situated) to Grimsby.

4. The plaintiffs carry coal for Bannister and for Josse & Co. as well as for the defendants. The plaintiffs carry coal for the defendants, for Bannister, and for Josse & Co. from the Denaby Main Colliery to Grimsby for shipment there. Upon all the coals sold by the defendants to Bannister or to Josse & Co. and carried by the plaintiffs from Denaby Main Colliery to Grimsby (whether for shipment or for land sale at Grimsby as hereinafter mentioned) the carriage has been paid by Bannister or Josse & Co. as the case might be. Upon coal sold by the defendants to other customers (whether for such shipment or land sale) the carriage has been paid sometimes by the defendants and sometimes by the customers. From February 1874 to December 1876 the plaintiffs made to Bannister an allowance or rebate of 8*d.* per ton from the published rate of carriage in respect of all coal shipped by certain steamers known as the Hamburg American steamers.

5. The circumstances under which this allowance was made are as follows:—The Hamburg and American Steam Shipping Company had a line of steamers to the West Indies. The agents of

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the plaintiffs induced them to make Grimsby a calling place for their ships. They were accustomed to use Welsh coal. It was ascertained by the plaintiffs that if the Hamburg company could get the South Yorkshire coal at a reduction of 10*d.* or 1*s.* on the then current prices they would buy coal at Grimsby in place of the Welsh coal. To enable this to be done and in the hope that the South Yorkshire coal might thus be introduced to the West Indian market, the plaintiffs agreed to make to Bannister an allowance of 8*d.* per ton upon the rates for carriage of South Yorkshire coal from any colliery in the South Yorkshire Coal Field to Grimsby (including the Denaby Main Colliery) in respect of all coal shipped by the Hamburg American steamers. They did in fact make to Bannister such allowance on all such coals so shipped, but there was no evidence to shew from what particular collieries in the South Yorkshire Coal Field such coal came. They gave no public or other notice that they were doing so or that they would make similar allowances to other persons under similar circumstances.

There was no contract on the part of Bannister that any definite quantity should be so shipped, and the services performed by the plaintiffs in respect of such coal were identical with those performed by them in respect of any other coal shipped at Grimsby. They did in fact carry for the defendants between February 1874 and December 1876 large quantities of coal for shipment at Grimsby in respect of which they charged and received the full rate (during one portion of the time of 3*s.* 8*d.* and during the residue of 3*s.* 4*d.* per ton). The last-mentioned coals except in so far as may appear in this paragraph were carried under the same circumstances as the coals shipped by the Hamburg American steamers. The allowance in question was not known to the defendants at the time it was made nor for several years afterwards.

The said allowance was made to Bannister only in respect of coal shipped on board the said steamers and not in respect of any other coal carried by the plaintiffs for him for shipment at Grimsby.

6. After December 1876 the Hamburg American steamers ceased to call at Grimsby and the allowance thus came to an end.

7. The coal sent to Grimsby from the various South Yorkshire collieries was partly for shipment, partly for land sale at Grimsby. There were different rates for the carriage according as coal was for shipment or for land sale. The several rates charged from time to time during the period covered by this action for the carriage of coal for shipment and land sale respectively were as follows:—From December 1874 to June 30 1876 for land sale 4*s.* 2*d.*, for shipment 3*s.* 8*d.* From July 1st 1876 to July 1878 for land sale 4*s.* 2*d.*, for shipment 3*s.* 4*d.* From August 1878 to June 1879 for land sale 3*s.* 10*d.*, for shipment 3*s.* 4*d.* From July 1879 to December 1880 for land sale 3*s.* 10*d.*, for shipment 3*s.* 1*d.* The above charges were made to every one for whom the plaintiffs carried coal from the South Yorkshire Coal Fields except Bannister and Josse & Co. Many years ago the plaintiffs agreed with Bannister to charge him in respect of coal for land sale the same rates as in respect of coal for shipment. The shipment rate was at that time 3*s.* 8*d.* and during the whole period covered by this action Bannister continued to be charged at the rate of 3*s.* 8*d.* for land sale coal, thus giving him an allowance at one time of sixpence and afterwards of twopence per ton. From July 1876 to July 1878 the plaintiffs made Josse an allowance of fourpence per ton upon the rates charged in respect of his land sale coal.

8. Land sale coal for persons other than Bannister and Josse & Co. has to be taken into the goods yard of the plaintiffs and there placed upon sidings and kept until taken away by the consignee. Charges for the occupation of sidings are made by the plaintiffs after the trucks have remained two days upon the siding. Bannister and Josse & Co. have coal yards of their own in Grimsby Town connected with the plaintiffs' line, and land sale coal for them was during the whole period covered by this action delivered directly into their yards, and upon such delivery the plaintiffs had nothing further to do with it. It was to the interest alike of Bannister and Josse & Co. and of the defendants to keep the trucks in which coals are delivered at Grimsby as short a time as possible, but the fact that Bannister and Josse & Co. had their own yards enabled them to return the trucks consigned to them upon the whole more promptly than the

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defendants could. Bannister and Josse & Co. and not the colliery owner paid the carriage upon all coal delivered at their respective yards.

9. By reason of the matters stated in paragraph 8 it cost the company less per ton to carry coals to Grimsby Town for delivery to Bannister and Josse & Co. than for delivery there to the defendants.

The plaintiffs have not shewn to my satisfaction that the allowance of either 6*d.* or 2*d.* a ton on all coal carried to Grimsby for Bannister, or that of 4*d.* a ton on all coal carried to Grimsby for Josse & Co., was adequately represented by the saving to the plaintiffs. No calculation or estimate of the amount of the saving appears to have been made when the allowance was agreed upon or at any other time. There was no difference in the amount so saved when the allowance to Bannister was 6*d.* and when it was 2*d.*, nor has any reason been given why a different amount was fixed upon as the allowance to Josse & Co. The arrangement to make an allowance of this description to Bannister was made many years ago upon the occasion of his establishing a yard of his own into which the coal might be delivered. The allowance to Josse & Co. began in 1876. The reason for making it is not otherwise explained than that it was made "at their earnest solicitation."

10. During the whole of the period covered by this action the plaintiffs have allowed to Bannister and to Josse & Co. a rebate of 2 per cent. upon their respective net debits in respect of coal traffic of every description (and whether in the plaintiffs' or in owners' waggons) carried for them. This allowance has not been made to any one else.

11. The plaintiffs make no separate charge for the return of empty waggons. Both Bannister and Josse & Co. own a large number of waggons and deal with many collieries. The defendants own a much larger number of waggons than either Bannister or Josse & Co., and a large quantity of the coal purchased by Bannister and Josse & Co. from the defendants was carried in the defendants' waggons. Both Bannister and Josse & Co. allow the plaintiffs to take any of their empty waggons to any colliery with which Bannister and Josse & Co. respectively deal to which

it may suit the plaintiffs to send them, no matter from what colliery they came when loaded. The plaintiffs cannot return the empty waggons of the defendants to any place other than the Denaby Main Colliery. The above statements apply both to land sale coal and to coal for shipment.

12. By reason of the matters stated in paragraph 11 the coal carried for Bannister and Josse & Co. during the period covered by the allowances aforesaid, taken as a whole and including in the term "carriage" the dealing with empty waggons, was carried more economically to the plaintiffs, than coal carried for the defendants.

The plaintiffs have not proved to my satisfaction that the allowance of 2 per cent. upon the net debits was adequately represented by the saving to the plaintiffs, and there is no necessary relation between the two values.

13. Between July 1874 and March 1880 the plaintiffs allowed to Bannister 6*d.* per ton on all coal shipped by him from Grimsby to English ports south of Harwich. The circumstances under which this allowance was made are as follows. There was little trade of this kind and Bannister undertook to develop the trade, to provide vessels, and to run the risks incidental to the working of such a traffic, and in consideration of his doing so and in view of the anticipated advantage to the company by the increased tonnage to be carried over their line the plaintiffs agreed to give him 6*d.* per ton upon the number of tons shipped. This was equivalent in amount to an allowance of 6*d.* per ton upon the carriage account in respect of the coals in question. But I find that the arrangement was bonâ fide of the description above given, and whether legitimate or not was not made with the object of giving a preferential rate of carriage to Bannister. In the company's books the sums due were credited every quarter of a year to Bannister under the description of "agency commission for shipment of coal by coastwise vessel to ports south of Harwich." No opportunity was afforded to the public in general, or to other persons sending coal by the plaintiffs' railway to Grimsby, of earning the like payment by the like services. The average amount of coal subject to this arrangement was about 15,000 tons per annum.

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14. The allowances to Bannister and Josse & Co. in respect of the carriage of coal for land sale (the 6*d.* 4*d.* or 2*d.* mentioned in paragraph 7), the allowance of 2 per cent. on net debits mentioned in paragraph 10, and the payment of 6*d.* per ton on coal shipped from Grimsby to places south of Harwich mentioned in paragraph 13, were unknown to the defendants until they were ascertained from discovery had in the action.

15. A difference of one halfpenny per ton has been during the period covered by this action a material factor in determining a contract for shipment, and a difference of three-halfpence per ton has been during the same period a material factor in determining a contract for land sale. Each of the various allowances made to Bannister and Josse & Co. was sufficient in amount to constitute (if the defendants are entitled to complain of it) a substantial disadvantage to the defendants in their competition with Bannister and Josse & Co.

16. The questions arising upon the foregoing statement are whether (1) the allowance of 8*d.* per ton to Bannister upon coal shipped by the Hamburg American steamers; (2) the allowance which was at one time 6*d.* and at another 2*d.* per ton made to Bannister, or that of 4*d.* per ton made to Josse & Co., upon coal carried to Grimsby for land sale there; (3) the allowance of 2 per cent. upon the net debits made to Bannister and Josse & Co.; (4) the payment of 6*d.* per ton to Bannister upon coal shipped from Grimsby for ports south of Harwich; constituted breaches of the Railways Clauses Consolidation Act 1845 s. 90. (5) If either the allowance of 8*d.* per ton to Bannister upon coal shipped by the Hamburg American steamers, or the payment of 6*d.* per ton to Bannister upon coals shipped from Grimsby for ports south of Harwich, was a breach of the Railways Clauses Act 1845 s. 90, upon what principle in either case is the amount of the overcharge to the defendants in this respect to be ascertained?

PART II.

17. During the period covered by this action the plaintiffs had one uniform set of rates for the carriage of coal from about forty-eight different collieries shewn in red in the map marked A,

which (with the schedule annexed) forms part of this case, to a number of places shewn in blue lying eastward of the collieries and served by the plaintiffs' railway. The most important of the collieries are enumerated and a table of distances is given in the schedule.

18. These collieries were (and are in this case) called "the group," and the rates from them to the said places lying to the eastward served by the plaintiffs' railway were (and in this case are) called "the group rates."

19. The defendants' colliery is the easternmost in the group, and the distance along the plaintiffs' line of railway between the defendants' colliery and the member of the group furthest from the defendants' colliery is fifteen miles.

20. The group rates comprised the rates from each of the said collieries to a great number of towns and places in various parts of England.

21. All coals going from any of the collieries comprised in the group to any of the last-mentioned towns and places must pass the defendants' colliery and go away thence in an easterly direction.

22. Before the 1st of January 1880, and after the 4th of December 1880, coal going away to the westward from any of the collieries comprised in the group was charged differing rates according to the distance from the colliery from which it was dispatched to the place of destination. There was no "grouping" for traffic westward. The defendants' colliery being the furthest to the eastward of the collieries in the South Yorkshire Coal Field paid the highest rates for coal going west, whilst they paid the same rates as the rest of the collieries in the group upon coals going east.

23. Between the 1st of January 1880 and the 4th of December 1880 the rates for carriage of coal westwards from any of the collieries comprised in the group were the same.

21. The bulk of the coals sent from the defendants' colliery have always gone eastwards but they have also had a substantial traffic westwards.

25. On the 8th of June 1880 the defendants applied to the Railway Commissioners to restrain the plaintiffs from charging the group rates.

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26. On the 26th of July 1880 the Railway Commissioners gave judgment in favour of the defendants and prohibited the plaintiffs from charging at equal rates between the various collieries comprising the group and the places lying to the eastwards to which the group rates applied. It is not disputed for the purposes of this case that the decision of the Railway Commissioners was right.

27. The plaintiffs have ceased to charge the group rates since the 26th of July 1880 and have thenceforward carried coals from the various members of the group at differential rates. The rates thus established are in respect of coal carried from the defendants' colliery lower in every instance than the group rates.

28. The defendants have been charged the group rates down to the 26th of July 1880.

29. For the purposes of this part of the case it is to be assumed that the circumstances under which payments have been made do not preclude the defendants from opening the accounts.

30. The defendants contend that the group rates were a violation of sect. 90 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) and of sect. 2 of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), and that they are entitled under either of these enactments to recover the difference between the amount actually paid by them for carriage of coals and the amount which would have been payable if proper differential charges had been made for carriage of coal from the different members of the group, and not only such differences but damages for breaches of the statutory duty.

31. The plaintiffs contest each of the above claims.

32. The questions for the opinion of the Court are:—

1. Did the group rates constitute a breach of the Railways Clauses Consolidation Act 1845 s. 90?

2. If so, are the damages of the defendants for the breach of that enactment limited to the amount of overcharges (and what is the measure of such overcharges), or can general damages also be recovered?

3. Does an action lie for breach of the Railway and Canal Traffic Act 1854 s. 2?

4. If so, are the damages of the defendants for the breach of

that enactment limited to the amount of overcharges (and what is the measure of such overcharges), or can general damages also be recovered?

The pleadings and any particulars delivered in the action are to be taken as parts of the case.

The Queen's Bench Division (Mathew and Day JJ.) made an order declaring that the matters in questions 1, 2, 3 and 4 of part 1 constituted breaches of the Railways Clauses Consolidation Act 1845; and that the group rate in question 1 of part 2 constituted a breach of the Railways Clauses Consolidation Act 1845; and that the defendants' damages for breach of that enactment were limited to surcharges; and further that no action lies for breach of the Railway and Canal Traffic Act 1854 s. 2 (1).

Both sides having appealed against that order so far as it was unfavourable to them respectively, the Court of Appeal (Brett M.R., Cotton and Lindley L.JJ.) made an order dismissing the defendants' appeal with costs, and made another order allowing the plaintiffs' appeal with costs, and entering judgment for the plaintiffs on the defendants' set-off and counterclaim (2). Against these two orders the defendants appealed.

July 6, 7, 9. Sir *R. Webster* A.G. and *Forbes* Q.C. (*Lofthouse* with them) for the appellants:—

As to part 1, the secret allowances to Bannister and Josse were a breach of the Railways Clauses Consolidation Act 1845 s. 90. Every customer trading under the same circumstances is entitled to have his goods carried at the same rate. The fact that the allowances of 8*d.* and 6*d.* to Bannister were for coals to be shipped to Hamburg and to ports south of Harwich respectively is no justification: the arbitrator finds the circumstances to be the same. As to the coal carried for land sale there are no differences in the circumstances in relation to the carriage. A mere differ-

(1) 13 Q. B. D. 674. In the course of delivering the judgment of the Court Mathew J. answered question 5 of Part 1 by saying "that the amount of the overcharge is to be ascertained in accordance with the principle laid down in *Eversheds Case*. The defendants are entitled to recover the charges made to them in excess of the charge made to Bannister for similar services." This did not appear in the order.

(2) 14 Q. B. D. 209.

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ence is not enough: the onus lies on the railway company to shew that the difference is sufficient to justify the differences in charges: as by a corresponding economy, or the like. The only circumstances which will justify a railway company in making a reduction to one customer are the risk, cost, trouble and other circumstances of the carriage, all pointing to a pecuniary difference to the company. The desire to develop a new business is not a justification: *In re Oxlade* (1); *In re Ransome and Eastern Counties Railway Company* (2). There must be a relation between the difference in the rate and the difference in the circumstances of carriage: *London and North Western Railway Company* v. *Evershed* (3). Equality was the aim of the legislature: *Great Western Railway Company* v. *Sutton* (4). An overcharge being made out, money had and received lies to recover it, and the question is one of mere calculation of tons carried. The appellants also ought to be allowed to give evidence of loss of custom; such a loss is not too remote: *Lancashire and Yorkshire Railway Company* v. *Gidlow* (5). As to part 2, the group rates were a breach of s. 90 of the Railways Clauses Consolidation Act 1845. That section is not confined to goods passing only between the same points of arrival and departure. The opinion of Lord St. Leonards in *Finnie* v. *Glasgow and South Western Railway Company* (6) is the preferable one. The decision in *Murray* v. *Glasgow and South Western Railway Company* (7) is not binding on this House. If however that section is held inapplicable, the appellants can maintain the action for a breach of sect. 2 of the Railway and Canal Traffic Act 1854. Sect. 6 of that Act does not prevent the injured party from bringing an action for past offences. The special procedure was created only for the future. That section was passed not because sect. 90 of the Railways Clauses Consolidation Act 1845 had failed but to meet another class of grievances, see per Bramwell, L.J. in *Evershed's Case* (8).

(1) 1 C. B. (N.S) 454; 26 L. J. (C.P.) 129.

(2) 1 C. B. (N.S.) 437; 4 C. B. (N.S.) 135; 26 L. J. (C.P.) 91; 27 Ibid. 166.

(3) 2 Q. B. D. 254; 3 Q. B. D. 134; 3 App. Cas. 1029.

(4) Law Rep. 4 H. L. 226.

(5) Law Rep. 7 H. L. 517, 524, 525.

(6) 2 Macq. 177, 186.

(7) 11 Court Sess. Cas. 4th Series, 205.

(8) 3 Q. B. D. 143.

Sir *F. Herschell* Q.C. and *Littler* Q.C. (*C. A. Russell* with them) for the respondents :—

As regards the group rates, no action will lie: *Finnie* v. *Glasgow and South Western Railway Company* (1) has always been held good law and acted on. If such an action lies, millions of actions will be brought against railway companies: e.g. against the Metropolitan District for charging (as they do) the same fares for varying distances. Sect. 90 of the Railways Clauses Consolidation Act 1845 is not happily drawn. It is not clear why it was necessary to give power to vary the tolls. The power no doubt is subject to the rates being kept within the maximum: and provided that limit is observed one would suppose the company had the power of variation without special provision. But, however that may be, the only reasonable construction is that laid down in *Finnie* v. *Glasgow and South Western Railway Company* (1). No other construction is tenable, except one requiring equal mileage rates, and that construction the appellants reject. They cannot succeed unless they shew that either they have paid more, or somebody else has paid less, in respect of the same portion of the line: and that cannot be shewn. *Attorney-General* v. *Birmingham and Derby Junction Railway Company* (2), a decision on a similar section in a special Act, is in favour of the respondents. As to questions 2 and 3 in part 1, the respondents admit that to justify inequality in charges there must be a difference of circumstances affecting the carriage; and the arbitrator has found such a difference. Once that is made out it is for the appellants to shew that the difference is not adequate to account for the inequality. No decision suggests that the onus is on the company to shew the contrary. As to question 4 there was nothing colourable or illegitimate. The giving money for commission is reasonably incident to the business of the company: *Attorney-General* v. *Great Eastern Railway Company* (3).

[They also referred to *Hare* v. *London and North Western Railway Company* (4); and *South Wales Railway Company* v. *Redmond* (5).]

(1) 2 Macq. 177.
(2) 2 Railw. Cas. 124.
(3) 5 App. Cas. 473; 49 L. J. (Ch.) 545.
(4) 2 Joh. & H. 80; 30 L. J. (Ch.) 817.
(5) 9 W. R. 806.

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Forbes Q.C. was heard in reply.

The House took time for consideration (1).

(1) Sect. 90 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) is as follows:—

"'And whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit: provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

Sect. 2 of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) is as follows:—

"Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station or wharf of the one near the terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf."

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My Lords, in dealing with the questions which are raised in this case, I think it most convenient to refer first to that portion of the second part of the special case which refers to what are called the group rates. I cannot think that the language of sect. 90 of the Railways Clauses Consolidation Act of 1845 is susceptible of the construction put upon it by Mathew and Day JJ. It seems to me that their construction strikes the word "only" out of the section, and I agree with the Court of Appeal that, in order to bring the case within the language of the section, the termini both of arrival and departure must be the same.

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The facts do not seem to me to raise the question whether, assuming a breach in this respect of the 2nd section of the Railway and Canal Traffic Act of 1854, this could be the foundation of any rights enforceable by action or otherwise than by the procedure of the Act itself, namely, interdict or injunction. I shall have hereafter to suggest a possible view of the 2nd and 6th sections of that Act, which does not seem to have been much considered in the Court of Appeal, possibly for the reason which operates upon my own mind in this case, that the facts may not render it necessary to express a decided opinion upon it. But for the reasons I have given, I think the decision as to the group rates was right; and although the decision of the Railway Commission may or may not be consistent with this view according to what may have been the real ground for that decision, yet, as no reasons for that decision are given, all I can say is that it may be consistent with the conclusion at which I have arrived.

With respect, however, to the statements in paragraphs 8, 9, and 12, I am in some doubt what facts the arbitrator has intended to find as proved. I doubt whether I am at liberty to find any fact beyond that which he has found, though peradventure it might be a fact to be inferred from what he has expressly found. He has indeed said that the saving to the company was not represented by the allowance made. He has said that it was not proved to his satisfaction with respect to the net debits that the allowance was adequately represented by the saving to the company. He has said that the only reason given for some of the

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allowances was urgent solicitation. I am not quite certain that I understand what is meant by the phrase that there was no necessary relation between the saving to the company and the allowances made. It may be that from these circumstances or others he might have inferred, what I think I am not at liberty to infer, that these were intentionally preferential arrangements favouring a particular trader. At all events I do not think that these circumstances of themselves are sufficient to enable me to say that the railway company were guilty of a breach of duty in respect of the charges that they made. It is for this reason that I think it unnecessary to consider whether it is accurate to assume that no cause of action could arise out of the breach of the 2nd section of the Act of 1854. It may well be that no application to any Court other than the Railway Commission for a relief against a breach of that section is permitted by the Act. It may be that no action will lie expressly for a breach of that section, but it is matter for consideration (and I wish to reserve my right to consider it if the question should hereafter arise) whether a railway company, having committed a breach of that section, and having in committing that breach extorted money for carriage to which by law they were not entitled, the ordinary remedies at law for extortion may not be applicable.

I also think that the coal carried from the appellants' colliery to Grimsby, and charged at different rates, although carried over the same portion, and only over the same portion of the line, ought to have been carried at the same rate as Bannister's coal. The ultimate destination of Bannister's coal seems to me to be immaterial, whether it was intended for shipment on the American steamers, or to be shipped to ports south of Harwich or elsewhere.

The remaining question, namely, what the appellants are entitled to recover from the company upon the hypothesis that they have been overcharged, is one which does not seem to me to be surrounded by the difficulty that has been assumed to exist. The arbitrator, to whom this question must go back, will be able to find on what quantities of coal the appellants were charged, during the periods when the railway company were carrying for Bannister at a less rate; and if the principle is laid down by your Lordships that the appellants' coal ought to have been carried at

the same rate, I am unable to see the difficulty of ascertaining the amount of overcharge.

I am therefore of opinion that the order appealed from should be reversed with reference to the coals carried for shipment by the American steamers and to ports south of Harwich, and that as neither party has completely succeeded there should be no costs on either side. I think, as pointed out by Lord Blackburn, our jurisdiction is to answer the questions propounded to us by the arbitrator, and not to enter any judgment for either party.

EARL OF SELBORNE:—

My Lords, it appears to me that the order appealed from is right as to the questions concerning what are called "group rates" stated at the end of the second part of the special case. I think it is clear that no action lies in this case for breach of the Railway and Canal Traffic Act of 1854, sect. 2; and I also think that these group rates were not within the proviso contained in sect. 90 of the Railways Clauses Consolidation Act of 1845.

It was not contended that under that section a railway company is required to charge equal mileage rates for the whole distance over which goods are carried on its line whatever that distance may be; and the complaint is, not that unequal rates were charged for coals carried for the same distance and over the same portion only of the railway, but that coals carried eastward from places westward of the appellants' colliery, and therefore passing over a greater length of the line than the appellants' coals, were charged too little. I am unable to dissent from Lindley L.J.'s opinion (which is in accordance with that of Lord Cranworth in *Finnie's Case* (1), upon words not exactly the same, but hardly stronger) that "passing *only* over the same portion of the line" means passing between the same points of departure and arrival, and passing over no other part of the line. Nor am I sure that the difference between Lord Cranworth and Lord St. Leonards in *Finnie's Case* (1) did not turn upon the particular facts of that case rather than upon the interpretation of the words, "over the same portion of, and over the same distance along the railway." I agree with Lord St. Leonards that the concluding words of the section, ("and no reduction or advance

(1) 2 Macq. 177, 183.

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shall be made either directly or indirectly in favour of or against any particular company or persons)," are not only capable of, but ought to receive an independent operation. But I do not think it possible to hold (looking at the context in which they stand) that the mere fact of inequality in the rate of charge when unequal distances are traversed can constitute a preference inconsistent with them. I think it must be proved as a fact that the case is one of favour or partiality to particular companies or persons, and I am unable to infer this without more than is found here by the second part of the special case.

There is indeed one finding in the special case which has made me hesitate upon this point, viz. that contained in the 26th paragraph, as to the action of the Railway Commissioners under the Act of 1854, admitted to have been right. But the provisions in pari materiâ of the Act of 1854 differ from the 90th section of the Act of 1845 in this important respect, that they prohibit everything which may operate as an "undue or unreasonable preference or advantage" not to particular persons or companies only but to "any particular description of traffic," and that generally, and not with any particular reference to the incidence of rates or tolls. The special case does not say that this decision of the Railway Commissioners turned upon what is common to both Acts rather than upon what was new in the Act of 1854. And if under the Act of 1854 the test of an equal mileage rate is not applicable, I cannot myself extract any other from the statements of the special case, by which the illegality of these group rates, before any interposition of the Railway Commissioners, can be established.

I am also of opinion that the order appealed from ought to be affirmed, so far as relates to the allowances made to Bannister and Josse on land sales and the 2 per cent. upon net debits likewise allowed to them, which are the subjects of questions 2 and 3 in the first part of the special case. The facts proved by paragraphs 8, 9, 11, and 12 shew that the "circumstances" applicable to the coals in respect of which those allowances were made were different from the circumstances under which the appellants' coals were carried, so as (according to the test applied in *Oxlade's Case* (1)), to make "the cost to the company less." And here, as

(1) 1 C. B. (N.S.) 454.

there, no facts are proved, which can be said properly to lead to the conclusion that what has really been done is a reduction "in favour of or against" particular persons under a colourable pretence of different circumstances. It is not proved that there was not a bonâ fide agreement for this purpose, founded on the saving to the company, without any improper object. The arbitrator does indeed state that "it was not shewn to his satisfaction" that the allowances on the land sales were "adequately represented by the saving to the plaintiffs"; or that there is any "necessary relation between the two values" of the saving mentioned in paragraphs 11 and 12, and the allowance of 2 per cent. on the net debits. But I am not satisfied that any precise measure of value could be applied à priori to such savings as these, which might vary in amount from time to time; and I do not find in the Act that when there is a real difference of circumstances, and nothing to shew any want of good faith, the burden of justifying the exact difference of charge (or, what is the same thing, the deduction or allowance) by shewing a numerical or "necessary relation" between it and the actual saving, is cast upon the company.

Between the case of Bannister and that of Josse & Co. there is no distinction, except that the allowance on land sales to Josse & Co. did not begin until 1876, and that "the reason for making it is not otherwise explained than that it was made at their earnest solicitation." If the circumstances as to Josse & Co. were otherwise similar to those as to Bannister (and it is so found), I am unable to see why the company should be held to have shewn them undue favour, merely because they waited till pressure was put upon them to make them the same allowances, and did so under that pressure.

The questions as to the allowance of 8*d.* per ton to Bannister upon coal shipped by the Hamburg American steamers, and the payment to him of 6*d.* per ton upon coal shipped from Grimsby for ports south of Harwich, remain. To both these allowances the same principles appear to me to be applicable. I cannot think that the circumstances under which the 6*d.* per ton was allowed, as stated in paragraph 13 of the special case, ought to make any difference. All these coals are proved to have been

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carried "only over the same portion of the line, and under the same circumstances," as the appellants' coals. The motives and reasons for making these allowances are plainly not material, as against the appellants' claim to have their coals carried on the same terms.

The opinion of the majority of the judges in *Sutton's Case* (1) delivered by Blackburn J. and adopted by Lord Chelmsford, Lord Cairns and Lord Colonsay, and that of the whole Court in *Oxlade's Case* (2), on the Staffordshire traffic, to which may be added *Evershed's Case* (3), seem to me decisive on this point. So, indeed, the Court of Appeal appear to have thought; but regarding the question as one of damages rather than overcharge, and apparently thinking that no claim for damages could be sustained on this account, they reversed the judgment of the Queen's Bench Division on this point also. With that reversal I cannot agree; and I am of opinion that, as to these two allowances, the order appealed from ought to be reversed.

The arbitrator has asked (question 5 in the first part of the special case), "upon what principle the amount of the overcharge in this respect is to be ascertained?" Unless insuperable difficulty arises from the fact that these allowances were made only on the particular coals shipped, during certain periods of time, by the Hamburg American steamers, and for ports south of Harwich (the exact quantities are, or may easily be, ascertained), I agree with the arbitrator in holding this to be a case of overcharge, and not a question of damages; and I should answer his question (upon the authority of *Sutton's Case* (4), and *Evershed's Case* (5) and of the opinion of Lord St. Leonards in *Finnie's Case* (6)) by saying that the proper measure of the overcharge to the appellants is the difference between the amount charged to them, and that charged (after deducting the allowance) to Bannister, for coals carried over the same part of the railway and under the same circumstances, during the same periods of time. Is there, then, any insuperable difficulty arising out of the fact that, during these periods of time, not only the coals on which

(1) Law Rep. 4 H. L. 236.
(2) 1 C. B. (N.S.) 496.
(3) 3 App. Cas. 1029.
(4) Law Rep. 4 H. L. 226.
(5) 3 App. Cas. 1029.
(6) 2 Macq. 186.

these allowances were made, but also other coals, on which Bannister was charged the same rates with the appellants, were carried over the same distance, and under the same circumstances? I do not think so. It being known how much coal was actually carried at the reduced rate for Bannister during these periods, it seems to me to result from the principle established in the cases of *Sutton* (1) and *Evershed* (2), that the appellants ought to have been charged at the same reduced rate up to, but not beyond, the same total quantity during the same period of time, and that this is the true measure of the overcharge, for which the arbitrator ought to give them credit. I think that for this purpose the particular destination of Bannister's coals, and the fact that the appellants did not ship coals by the Hamburg American steamers, or to ports south of Harwich, ought to be disregarded as immaterial. If a different view were adopted by your Lordships, railway companies might, to a very great extent, escape from the provisions of the Act, merely by making allowances to favoured customers on some definite part, less (by which I mean substantially and not only colourably less) than the whole of the goods carried for them. I think (with the Court of Appeal) that there would be very great difficulty, if the principle of overcharge were rejected, in finding any other remedy by way of damages applicable to such a case.

I am, therefore, of opinion that the order now under appeal should be partially reversed, and that the fifth question of the arbitrator, in the first part of the special case, should be answered in the manner I suggested. As to costs, the appellants have succeeded only in a part of their case, and that apparently the least considerable in amount. In *Oxlade's Case* (3), under somewhat similar circumstances, no costs were given.

LORD BLACKBURN:—

My Lords, Wills J. whilst yet at the bar, as arbitrator stated a special case. He did not, as is sometimes done, finally dispose of the matters referred to him, subject to the opinion of the Court; but it appearing that several questions of law were raised in the

(1) Law Rep. 4 H. L. 226. (2) 3 App. Cas. 1029.
(3) 1 C. B. (N.S.) 454.

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reference, he, at the request of both parties, stated a case, finding the facts so far only as necessary to raise the questions on which there was a difficulty. When those questions are answered the cause must, unless the parties otherwise agree, go back to the arbitrator, or, in the event which has happened, to some other arbitrator appointed in his place, who will have to apply the law as declared by the Court. I think the order of reference justified him in stating such a case.

The Queen's Bench Division (consisting of Mathew J. and Day J.) made this order dated the 5th of July 1884:—"This Court doth declare that the matters in questions 1, 2, 3, and 4 of Part I. constitute breaches of the Railways Clauses Consolidation Act 1845, and that the group rate in question 1 of Part II. constitutes a breach of the Railways Clauses Consolidation Act 1845, and that the defendants' damages for breach of that enactment are limited to surcharges, and further that no action lies for breach of the Railway and Canal Traffic Act 1854 s. 2."

Both sides appealed to the Court of Appeal. The judgment of the Court of Appeal (consisting of the Master of the Rolls, Cotton L.J., and Lindley L.J.) was unanimous and their reasons were delivered by Lindley L.J., whose judgment is reported (1). The Court of Appeal made two orders,—one on the appeal by the colliery company against the order of the Queen's Bench Division, ordering that the appeal be dismissed with costs; the other on the appeal by the railway company, ordering that the appeal be allowed with costs, and that judgment be entered for the plaintiffs (the railway company) on the defendants' (the colliery company's) set-off and counterclaim.

Against these two orders of the Court of Appeal the colliery company have appealed to this House. I am a little embarrassed by the form of the last order, as I do not see how, in any view, the Court could be justified in doing more than answer the questions submitted to them, and no question is submitted as to what judgment was to be entered.

I shall endeavour to dispose of the merits, and consider how the questions raised on the special case ought to be answered. And I think that, in a great degree, depends on what is the effect

(1) 14 Q. B. D. 209.

of the legislation on the subject, so far as it applies to the state of things stated in the case.

The Railways Clauses Consolidation Act 1845 sect. 90 does not apply to Scotland. But the Railways Clauses Consolidation (Scotland) Act 1845 sect. 83, is in precisely the same words, and this makes the Scotch cases authorities on the construction of the English Act. I do not think that much assistance can be derived from that of *Finnie* (1), for not only was the House of Lords, consisting of Lord Cranworth and Lord St. Leonards, equally divided in opinion, but Lord Cranworth throws out some opinions which I think (since the subsequent decision of this House in *Great Western Railway Company* v. *Sutton* (2)) cannot be supported. But the case of *Murray* v. *Glasgow and South Western Railway Company* (3) is not open to any such observation. And the judgments in that case, especially those of the Lord President and Lord Shand, are, in my opinion, very valuable. That case was decided on the 29th of November 1883, a few months before the decision of the Queen's Bench Division in this case, but it was not brought to their notice. And though it was brought to the notice of the Court of Appeal, it was not till after the argument was completed, and, as I understood, just before the judgment, so that Lindley L.J. does not refer to the judgments so much as I think he probably would if they had been brought earlier to his notice. This is of the less consequence, as he seems to me to agree with them on every point.

The other Act which has to be considered is the Railway and Canal Traffic Act 1854, or rather the first six sections of that Act, for the 7th section has no bearing on this case. The construction of this Act is as much a question for the Courts of Scotland as for those of England.

There is nothing in the statement in the special case to raise any doubt that the goods with relation to which the case is stated were all of the same description. But it appears from the statement that, though some of the goods were carried only on the same portion of the line, there were others, more especially those mentioned in Part II. of the special case, that were not so carried.

(1) 2 Macq. 177. (2) Law Rep. 4 H. L. 226.
(3) 11 Court Sess. Cas. 4th Ser. 205

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And here there is a difference of opinion between the Queen's Bench Division and the Court of Appeal as to the construction of the Act of 1845.

I think that it is finally settled by *Great Western Railway Company* v. *Sutton* (1) and *Evershed's Case* (2), that if passing over the same portion of the railway (a fact which was not disputed in either of these cases), the obligation to charge, in respect of goods of the same description, equally, is imposed if they are "under the same circumstances," and that the circumstances are those relating to the carriage of the goods, not the person of the sender; that the fact that the persons who are charged less are, as in *Evershed's Case* (2), so situated that they can go by another route, and probably will do so if charged as much as the charge made to the complaining party, is not a circumstance justifying an unequal charge. Neither is it a difference of circumstances justifying an inequality of charge that those whom the railway charges less are seeking to develop a new trade. But though in *Sutton's Case* (1) and *Evershed's Case* (2) the goods were only carried over the same portion of the line, and therefore it was not necessary to say anything as to whether it was essential, to bring the case within that section, that they should be carried over the same portion only, nothing is said to indicate any opinion that this was not essential.

It may be that the railway companies succeeded in getting words introduced into the Railways Clauses Consolidation Act 1845, which limited the effect of the proviso in sects. 90 and 83 more than was politic. Whether this was so or not I do not inquire. But the words used seem to me capable of only one construction. I agree with the Court of Appeal in this case, and with the Court of Session in *Murray* v. *Glasgow and South Western Railway Company* (3), that these sections are confined to requiring equality of charge as to goods of the same description "passing only over the same portion of the railway" under the same circumstances.

The words of the 2nd section of the Railway and Canal Traffic Act 1854, are different from and much more extensive than

(1) Law Rep. 4 H. L. 226. (2) 3 App. Cas. 1029.
(3) 11 Court Sess. Cas. 4th Ser. 205.

those in the Acts of 1845. Those which I think bear on this case are: "No such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

If this sect. 2 had stood alone there might have been a very arguable question whether it did not impose a duty on the companies for the breach of which an action would have lain. But the 6th section seems to me to leave no doubt that it was the intention of the legislature that, so far as sect. 2 imposed a duty beyond that imposed by the then existing law, no action should lie, the only remedy to enforce performance of the new duty being by injunction or interdict. And this was the opinion of the Court of Session in *Murray* v. *Glasgow and South Western Railway Company* (1), and of both Courts below in this case, and nothing that was said on the argument has led me to doubt that on this they were right.

The injunction or interdict may be granted if it is shewn to the Court that there is an undue or unreasonable preference or undue or unreasonable prejudice. And this, I think, may be shewn, though, either because the goods are not carried over only the same portion of the line, or because the circumstances are not the same, there is no obligation under the Acts of 1845 to charge them equally. This was, I think, decided in *Re Ransome* (2), and *Re Oxlade* (3). In those cases the Court of Common Pleas refused to grant an injunction ordering the company to charge an equal mileage, as it was not shewn that there were not circumstances making it more expensive to carry the applicants' coals than those of others, but the Court of Common Pleas granted an injunction not to charge the applicant "for the carriage of coals at a higher rate than they charge other persons, having a due regard to the circumstances, if any, which render the cost to the company of carrying for the one party less than the cost of carrying for the other."

(1) 11 Court Sess. Cas. 4th Ser. 205. (2) 1 C. B. (N.S.) 437, 453.
(3) 1 C. B. (N.S.) 454, 497.

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I think that it follows from the change of language in the Act of 1854 from that in the Acts of 1845, that this was right. I do not think, therefore, the decision of the Railway Commission, which is mentioned in the 26th paragraph of the special case, at all inconsistent with the judgment of the Court of Appeal that the group rates do not constitute a breach of the 90th section.

I think that the statements in paragraphs 9 and 12 of the special case shew that the circumstances under which the coals there alluded to were carried for Bannister and Josse & Co., were not the same as those under which coals from the same termini were carried for the appellants. I think, if an application were made for an injunction under the Act of 1854, *Oxlade's Case* (1) shews that it would be important to consider the statements at the end of paragraphs 9 and 12, as they would certainly at least tend to shew that the allowances actually made were not "made with a due regard to the circumstances which rendered the cost to the company of carrying for the one party less than the cost of carrying for the other"; but I think that even if it were distinctly found that the difference in the charges actually made were so disproportioned to the differences in the cost as to be undue and unreasonable, it would not impose an obligation to charge equally.

So far, therefore, I think the judgment of the Court of Appeal is in substance right.

But I am unable to agree in their judgment as to the coal carried from the appellants' colliery to Grimsby and there shipped on the American steamers, and the coal carried from the same colliery to Grimsby and shipped to ports south of Harwich. I do not think that a desire, however bonâ fide, to foster a new trade can justify making a difference of charge on coals "passing only over the same portion of the line of railway under the same circumstances." And I do not think that it makes any difference in the "circumstances," where coals are delivered at Grimsby for shipment, that one parcel is shipped on a vessel bound for one port and another parcel on a vessel bound for another. And I feel obliged, unwillingly, to agree with the Divisional Court in their construction of the 13th paragraph of the case that the railway company did really charge less to Bannister for the carriage of this coal.

(1) 1 C. B. (N.S.) 454, 497.

Lindley L.J. says, that the respondents "have infringed this provision of sect. 90 as regards some of the coal referred to in the first and fourth questions." So far, I think, there is no difference of opinion between the Courts below.

He adds, "the consequences of this infringement will be considered presently," and it is on the part of the judgment where this is considered that I am obliged to differ from the judgment. I think it is as well to read the part of the judgment from which I differ: "It remains only to consider what damages, if any, the defendants have sustained by reason of the company's reduction of their tolls for the coal carried from the defendants' colliery for Bannister, and shipped at Grimsby for the American steamers and for ports south of Harwich. The defendants in fact sent no coals to Grimsby for such shipment, nor did they ever request the railway company to carry coals for such shipment. If they had there is no reason to suppose that they would have been charged more than Bannister. The complaint of the defendants is that the railway company prevented them from competing in trade with Bannister; but this is not made out. The railway company in no way prevented the defendants from obtaining orders from the Hamburg and American Shipping Company for South Yorkshire coal. Nor did the railway company prevent the defendants from shipping coals to ports south of Harwich, on the same terms as regards tolls as Bannister. The fact, however, remains that at various times the railway company did carry coals to Grimsby for the defendants and Bannister under the like circumstances, as regards trouble and cost to the company, and as regards coal got from the defendants' collieries over the same portion of the line, and the company did charge Bannister for the coals so carried for him less than they charged the defendants. And if the defendants had shewn that they had thereby sustained pecuniary loss, they would have been entitled to recover damages in respect thereof. The Divisional Court has held the defendants entitled to recover overcharges made to the defendants, on the principle laid down in *Evershed's Case* (1), i.e., the charges made to them in excess of the charges made to Bannister for similar services. But the Court does not say on what quantity of coal, or on how much of the defendants' coal

(1) 3 App. Cas. 1029.

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carried to Grimsby, this excess is to be calculated, and we are unable to see how the quantity is to be fixed. This difficulty did not arise in *Evershed's Case* (1), and the principle of that case seems to us inapplicable to the assessment of damages in this case. It cannot be right to calculate the amount of overcharge on all the coal sent by the defendants to Grimsby without reference to the quantity on which, or the times during which, a less rate was charged to Bannister, and, as already stated, we do not see on what principle to fix the amount of alleged overcharge. Under the peculiar circumstances of this case, the defendants have not shewn any grounds which will justify the Court in holding the railway company liable to them for any overcharges or damages. There is, therefore, nothing to be ascertained by the arbitrator on this head. The result, therefore, is that all five questions must be answered adversely to the defendants, and that, on the facts stated in the special case, the plaintiffs are entitled to judgment on the set-off and counterclaim pleaded by the defendants. The costs of the action and reference will be disposed of by the arbitrator, but the railway company is entitled to the costs of the appeal. Judgment for the plaintiffs."

I think that the earlier part of this shews very satisfactorily that, even if an action could be brought for special damages arising from a breach of the obligation under sect. 90 to charge equally, there are not any grounds for such an action here. But I am not satisfied with the way in which Lindley L.J. deals with *Evershed's Case* (1), and the mode in which the Divisional Court had applied it. I think that it cannot be right to calculate the amount of overcharge on all the coal sent by the defendants from their colliery to Grimsby for shipment without reference to the quantity of coal on which, or the times during which, the less rate was charged to Bannister for coal carried from the defendants' colliery. The arbitrator has not yet found, and I do not think he was bound to find in the special case, what part of the coals carried by the railway were carried only over the same part of the railway with those carried for Bannister during the same time, so as to make this charge on these coals extortionate. I think when the case goes back he will have to find this in order to ascertain

(1) 3 App. Cas. 1029.

the amount, if any, which can be recovered back as an overcharge. I do not think it likely that it will be found that there is nothing to be recovered under this head; it may be that it will be so found.

I cannot therefore agree with the Court of Appeal in thinking that there is nothing to be ascertained by the arbitrator on this head.

I doubt very much whether the Court has any jurisdiction to make an order as to how the arbitrator is to deal with the judgment on the set-off and counter-claim, or to do anything except to answer the questions, in which that is not included. But it is not necessary to consider this more technical point, if your Lordships agree with me in thinking that the order is wrong in substance.

I think that as the result is that neither the appellants nor the respondents have entirely succeeded, there should be no costs of this appeal.

LORD FITZGERALD :—

My Lords, I have read the two elaborate opinions which have been delivered by my noble and learned friend near me and my noble and learned friend opposite, and I entirely concur in the order which it is proposed to make, and have nothing to add.

Ordered, that the first of the two orders appealed against, viz. that by which it was ordered that the appeal by the defendants against the order of the Queen's Bench Division be dismissed with costs, be affirmed; and the second of those orders, viz., that by which it was ordered that the appeal by the plaintiffs against the said order be allowed with costs and that judgment be entered for the plaintiffs on the defendants' set-off and counter-claim, be reversed. Declaration in answer to the 1st 4th and 5th questions in Part I. of the special case, that the allowance of 8d. per ton upon coal shipped by the Hamburg American steamers, and the payment of 6d. per ton to Bannister upon coal

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shipped from Grimsby for ports south of Harwich were, in so far as they were in respect of coal carried only over the same part of the line with the defendants' coal, breaches of the Railways Clauses Consolidation Act 1845 *sect.* 90; *and that the arbitrator must ascertain what quantity of coal carried under the same circumstances and on the same portion only of the line was charged at the higher rate to the defendants at the time the lower rate was charged to Bannister, the fact that the coal was shipped on the American steamboats or to the south of Harwich not being a difference in the circumstances: and so ascertain the amount of the over-charge. Declaration in answer to the 2nd and 3rd questions in Part I. that the allowances there mentioned are not breaches of the Railways Clauses Consolidation Act* 1845 *sect.* 90, *as the circumstances stated are not the same. Declaration in answer to the questions asked in Part II., that the group rates did not constitute a breach of the Railways Clauses Consolidation Act* 1845 *sect.* 90; *and that an action does not in this case lie for breach of the Railway and Canal Traffic Act* 1854 *sect.* 2. *Ordered that with these declarations the case be remitted to the arbitrator. That there be no costs of the appeal in this House allowed to either side, and that any costs paid by the defendants to the plaintiffs under the order hereby reversed be repaid. Cause remitted to the Queen's Bench Division.*

Lords' Journals 17th Dec. 1885.

Solicitors for appellants: *Indermaur & Brown for F. W. Fisher, Doncaster.*

Solicitors for respondents: *Cunliffes & Davenport for R. Lingard Monk, Manchester.*

[HOUSE OF LORDS.]

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THE DARLEY MAIN COLLIERY COMPANY . . . . . } APPELLANTS;

AND

THOMAS WILFRID HOWE MITCHELL RESPONDENT.

Limitations, Statute of (21 *Jac.* c. 16)—*Cause of Action—Damages, recovery of for Injury after Satisfaction for previous Injury arising from same Act—Support—Action for Subsidence after Compensation for previous Subsidence.*

Lessees of coal under the respondent's land worked the coal so as to cause a subsidence of the land and injury to houses thereon in 1868. For the injury thus caused the lessees made compensation. They worked no more, but in 1882 a further subsidence took place causing further injury. There would have been no further subsidence if an adjoining owner had not worked his coal, or if the lessees had left enough support under the respondent's land:—

Held, affirming the decision of the Court of Appeal, Lord Blackburn dissenting, that the cause of action in respect of the further subsidence did not arise till that subsidence occurred, and that the respondent could maintain an action for the injury thereby caused, although more than six years had passed since the last working by the lessees.

Nicklin v. *Williams* (10 Ex. 259) and *Backhouse* v. *Bonomi* (E. B. & E. 622; 9 H. L. C. 503) discussed. *Lamb* v. *Walker* (3 Q. B. D. 389) overruled.

APPEAL from a decision of the Court of Appeal (1).

The respondent having brought an action against the appellants for damages for injuries done to his cottages by subsidence in the ground on which they stood, caused by the improper working of the defendants' colliery, among other defences they set up the Statute of Limitations. At the trial before Hawkins J. at the Leeds Summer Assizes 1883 the following facts were proved or admitted:—

The plaintiff was the freeholder of six perches of land and three cottages thereon, in the parish of Darfield, Yorkshire. The defendants were lessees of a seam of coal under the plaintiff's land, and worked the coal up to 1868. In consequence of that

(1) 14 Q. B. D. 125.

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working a subsidence of the land took place in 1868 causing injury to the plaintiff's cottages, in respect of which the defendants were required to and did then execute repairs. The defendants never worked the coal after 1868, but in 1882 a further subsidence of the land took place, causing further injury to the cottages. For this injury this action was brought in December 1882.

The special jury having been discharged by consent, Hawkins J. on further consideration entered judgment for the defendants upon the defence of the Statute of Limitations, the plaintiff's counsel admitting that he could not distinguish the case from *Lamb* v. *Walker* (1). The Court of Appeal (Brett M.R., Bowen and Fry LJJ.) reversed this decision and entered judgment for the plaintiff for damages to be assessed by an arbitrator (2). From this decision the defendants appealed.

During the argument of the respondent's counsel before the House a discussion took place as to the cause of the subsidence in 1882, and in the result the following statement was agreed to in writing between the appellants' and respondent's counsel:— That after the partial subsidence in 1868 the strata remained practically quiescent until the working of the coal in the next adjoining land in 1881, which working caused a "creep" and a further subsidence. That if the owner of the adjoining land (one Cooper) had not worked his coal there would have been no further subsidence; but the appellants admit that if the coal under the respondent's land had not been taken out or if the appellants had left sufficient support under the respondent's land, then the working of the adjoining owner would have done no harm.

1885. July 10, 13, 14. Sir *R. E. Webster* A.G. and *Forbes* Q.C. (*G. Banks* with them) for the appellants:—

The question is whether (as the appellants deny) the Court of Appeal were right in overruling *Nicklin* v. *Williams* (3) and *Lamb* v. *Walker* (1). When a cause of action has once developed itself the Statute of Limitations begins to run. The excava-

(1) 3 Q. B. D. 389. (2) 14 Q. B. D. 125.
(3) 10 Ex. 259.

tion and the subsidence which took place in 1868 and then caused damage were the whole cause of action. The further subsidence in 1882 was not a fresh cause of action, but part of the original cause, there having been no fresh workings. This is the principle governing *Nicklin* v. *Williams* (1) and that case was approved by the Queen's Bench in *Backhouse* v. *Bonomi* (2). Willes J. in delivering the judgment of the Exchequer Chamber (p. 658), says that where actual damage has been sustained "no second or fresh action can be brought for subsequently accruing damage; all the damage consequent upon the unlawful act is in contemplation of law satisfied by the one judgment or accord." In this House that judgment and the reasons were approved by the judges in attendance, and were distinctly adopted by the House (3). Lord Westbury there (p. 512) expressed approval of *Nicklin* v. *Williams* (1), saying: "The decision of that case is, I think, beyond all question." *Lamb* v. *Walker* (4) is a direct authority for the appellants. It is not the excavation which is the wrongful act: it is the excavation without precautionary measures. There is a fallacy in the reasoning of the Court of Appeal on this point. As soon as any damage occurs the cause of action is complete; the whole damage is then recoverable. The case of slander causing special damage is analogous. There cannot be successive actions for one slander whenever additional special damage occurs.

The judgment of Brett M.R. errs in speaking of "successive and independent subsidences." No man can say where a subsidence ends or begins: the motion is continuous. That judgment also errs in supposing that the decision of the House of Lords in *Backhouse* v. *Bonomi* (3) is inconsistent with *Nicklin* v. *Williams* (1). The two cases of *Whitehouse* v. *Fellowes* (5) and *Brunsden* v. *Humphrey* (6) are not against the appellants, the circumstances being quite different, and the causes of action clearly distinct.

[They also referred to *Penruddock's Case* (7).]

(1) 10 Ex. 259.
(2) E. B. & E. 622.
(3) 9 H. L. C. 503, 511.
(4) 3 Q. B. D. 389.
(5) 10 C. B. (N.S.) 765.
(6) 14 Q. B. D. 141.
(7) 5 Rep. 100 b.

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Rigby Q.C. and *C. E. Ellis* for the respondent:—

There are here two causes of action: the cause of action is not the digging, but the interference with the right of support which causes damage. An injury has not occurred till it is known to be an injury. The wrong is the letting down the surface. Comyns' Dig. Action on the case for Nuisance (A) p. 418, citing 2 Roll. 565 l. 10, treats the case of a man "digging a pit on his land so near that my land falls into the pit," as a nuisance. In *Backhouse* v. *Bonomi* (1) Wightman J.'s view is in our favour, and there is nothing against it in the judgments of the other judges. In that case (p. 631) there was a special finding as to the continuance of the thrust and the probability of future damage. Willes J. there said (p. 655) that until the decision in *Nicklin* v. *Williams* (2) it was never supposed that digging in a man's own soil to any extent was unlawful. The passage in the judgment of Willes J. relied upon by the appellants (3) was itself extra-judicial, as he afterwards admitted in *Whitehouse* v. *Fellowes* (4).

[LORD BRAMWELL:—What Willes J. said in *Whitehouse* v. *Fellowes* (4) was obiter; commenting upon his own obiter observations in *Backhouse* v. *Bonomi* (3) upon the dicta in *Nicklin* v. *Williams* (2), which themselves were obiter.]

Between the decisions in the Exchequer Chamber and the House of Lords came *Rowbotham* v. *Wilson* (5), where Lord Wensleydale's observations shew that he recognised the principle now contended for by the respondent that till injury no action lies.

[LORD FITZGERALD referred to *Devery* v. *Grand Canal Co.* (6).]

The only question discussed or decided by the House in *Backhouse* v. *Bonomi* (7) was the question raised by the memorandum; and there is absolutely nothing in the final decision hostile to the respondent. If the first damage consequential on the digging is recoverable though the digging is more than six years old, why

(1) E. B. & E. 622, 642, 645, 652, 655.
(2) 10 Ex. 259.
(3) E. B. & E. 658.
(4) 10 C. B. (N.S.) 785.
(5) 8 H. L. C. 348, 359, 364.
(6) 8 Ir. Rep. C. L. 511; 9 Ibid. 194.
(7) 9 H. L. C. 503, 511.

is not the second? The excavation being left as it was without support is analogous to a continuing nuisance, and the law applicable thereto should be applied here; see *Rosewell* v. *Prior* (1); and *Thompson* v. *Gibson* (2).

In defamation where the words are actionable in themselves the statute runs from the speaking of the words; but where they are not actionable in themselves it runs from the damage: *Saunders* v. *Edwards* (3); *Littleboy* v. *Wright* (4). There are no decisions on slander which assist the determination of the point, though there are dicta: see *Lord Townsend* v. *Hughes* (5) per North C.J. In *Fetter* v. *Beal* (6) Lord Holt is reported (in Modern Reports but not in the other reports) to have said: "If A. bring an action for words actionable in themselves and recover damages, and afterwards by reason of the words she lose a husband, yet no action will lie afterwards for the special damage; and so if the words be actionable for the special damage which party has suffered by reason of them, and for that damages are recovered, and after the party has another special damage." The appellants will rely on *Clarke* v. *York* (7) but there is no analogy, the position was altered: the existing cause of action had passed into res judicata. The law of subjacent support is based on the same principle as the law of adjacent support: *Humphries* v. *Brogden* (8).

Sir *R. Webster* A.G. in reply:—

Nicklin v. *Williams* (9) decided more than was overruled in *Backhouse* v. *Bonomi* (10), see *Clarke* v. *York* (7). The plaintiff has a right to have his land at its original height: he has no right to have it at the intermediate height to which it was brought in 1868. There is no case in which damage without a wrongful act or omission has been held to give a cause of action. The plaintiff could have recovered for the subsequent damages in the first action. It was then known to experts that a working

(1) 2 Salk. 460.
(2) 7 M. & W. 456.
(3) 1 Sid. 95; Sir T. Raym. 61.
(4) 1 Lev. 69; 1 Sid. 95.
(5) 2 Mod. 150.
(6) 1 Ld. Raym. 339, 692; 1 Salk. 11; 12 Mod. 544.
(7) 52 L. J. (Ch.) 32.
(8) 12 Q. B. 739, 743.
(9) 10 Ex. 259.
(10) E. B. & E. 622.

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by the adjoining owner might injure the plaintiff. That was an element to be estimated in calculating the damages. To succeed, the respondent must contend that the jury ought to have been directed to exclude such damages.

The House took time for consideration.

Feb. 8, 1886. LORD HALSBURY:—

My Lords, in this case the plaintiff, the owner of land upon the surface, has sued the lessee of certain seams of coal below and adjacent to the plaintiff's land for having disturbed the plaintiff in the enjoyment of his property by causing it to subside. The defendants before and up to the year 1868 have worked, that is to say, excavated, the seams of coal, of which they were lessees. Their excavation caused a subsidence of the ground, for which they acknowledged their liability and made satisfaction. There were other subsidences after this, and as the case originally came before your Lordships, it was matter of inference only whether these subsidences were or were not in some way connected with, if not forming part of, the original subsidence. The parties have now by an admission at your Lordships' bar, placed the matter beyond doubt.

It has been agreed that the owner of the adjoining land worked out his coal subsequently to 1868. That if he had not done so there would have been no further subsidence, and if the defendants' coal had not been taken out, or if sufficient support had been left, the working of the adjoining owner would have done no harm. Under these circumstances, the question is whether the satisfaction for the past subsidence must be taken to have been equivalent to a satisfaction for all succeeding subsidences. No one will think of disputing the proposition that for one cause of action you must recover all damages incident to it by law once and for ever. A house that has received a shock may not at once shew all the damage done to it, but it is damaged none the less then to the extent that it is damaged, and the fact that the damage only manifests itself later on by stages does not alter the fact that the damage is there; and so of the more complex mechanism of the human frame, the damage is done in a

railway accident, the whole machinery is injured, though it may escape the eye or even the consciousness of the sufferer at the time; the later stages of suffering are but the manifestations of the original damage done, and consequent upon the injury originally sustained.

But the words "cause of action" are somewhat ambiguously used in reasoning upon this subject; what the plaintiff has a right to complain of in a Court of Law in this case is the damage to his land, and by *the* damage I mean the damage which had in fact occurred, and if this is all that a plaintiff can complain of, I do not see why he may not recover toties quoties fresh damage is inflicted.

Since the decision of this House in *Bonomi* v. *Backhouse* (1) it is clear that no action would lie for the excavation. It is not, therefore, a cause of action; that case established that it is the damage and not the excavation which is the cause of action. I cannot understand why every new subsidence, although proceeding from the same original act or omission of the defendants, is not a new cause of action for which damages may be recovered. I cannot concur in the view that there is a breach of duty in the original excavation.

In *Rowbotham* v. *Wilson* (2), Cresswell J. said that the owner of the mines might have removed every atom of the minerals without being liable to an action, if the soil above had not fallen; and what is true of the first subsidence seems to me to be necessarily true of every subsequent subsidence. The defendant has originally created a state of things which renders him responsible if damage accrues; if by the hypothesis the cause of action is the damage resulting from the defendant's act, or an omission to alter the state of things he has created, why may not a fresh action be brought? A man keeps a ferocious dog which bites his neighbour; can it be contended that when the bitten man brings his action he must assess damages for all possibility of future bites? A man stores water artificially, as in *Fletcher* v. *Rylands* (3); the water escapes and sweeps away the plaintiff's house; he rebuilds it, and the artificial reservoir continues to leak and sweeps it

(1) 9 H. L. C. 503. (2) 8 E. & B. 123, 157.
(3) Law Rep. 3 H. L. 330.

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away again. Cannot the plaintiff recover for the second house, or must he have assessed in his first damages the possibility of any future invasion of water flowing from the same reservoir?

With respect to the authorities the case of *Nicklin* v. *Williams* (1) was urged by the Attorney-General as an authority upon the question now before your Lordships, by reason of some words attributed to Lord Westbury in *Bonomi* v. *Backhouse* (2). If Lord Westbury really did use the words attributed to him, it is, I think, open to doubt in what sense they are to be understood. Baron Parke in that case delivered the judgment against the plaintiffs recovering any subsequently accruing damage, because, he said, the cause of action was the original injury to the right by withdrawing support. That principle is admittedly wrong, and was expressly held to be wrong in *Bonomi* v. *Backhouse* (2), since if that had been law there could have been no answer to the plea of the Statute of Limitations in that case. It is difficult to follow the Master of the Rolls when he says it was not necessary to overrule *Nicklin* v. *Williams* (1) by that decision. It seems to me to have been the whole point decided in *Nicklin* v. *Williams* (1), and how that case so decided can be an authority for anything I am at a loss to understand.

I think the decision of this case must depend as matter of logic upon the decision of your Lordships' House in *Bonomi* v. *Backhouse* (2), and I do not know that it is a very legitimate inquiry, when a principle has been laid down by a tribunal from which there is no appeal, and which is bound by its own decisions, whether that principle is upon the whole advantageous or convenient; but if such considerations were permissible, I think Cockburn C.J. in his judgment in *Lamb* v. *Walker* (3) establishes the balance of convenience to be on the side of the law, as established by *Bonomi* v. *Backhouse* (2). I cannot logically distinguish between a first and a second, or a third, or more subsidences, and after *Bonomi* v. *Backhouse* (2) it is impossible to say that it was wrong in any sense for the defendant to remove the coal. Cresswell J. has said, and I think rightly, that he might remove every atom of the mineral.

(1) 10 Ex. 259. (2) 9 H. L. C. 503, 512.
(3) 3 Q. B. D. 389.

The wrong consists, and, as it appears to me, wholly consists, in causing another man damage, and I think he may recover for that damage as and when it occurs.

For these reasons, I think that the judgment appealed from should be affirmed with costs.

LORD BLACKBURN:—

My Lords, at the close of the argument I came to the conclusion that the judgment should be reversed; and prepared and circulated an opinion containing the reasons which led me to that conclusion. All three of the other noble and learned Lords who heard the argument have come to the conclusion that the judgment should be affirmed, and that must be the judgment of the House. I think it better to read the reasons which I had before written.

This is an appeal against an order of the Court of Appeal, by which it was ordered that the judgment of Hawkins J. delivered, on further consideration, on the 18th of December 1883, should be reversed, and judgment entered for the plaintiff for damages to be assessed by an arbitrator to be agreed upon, with costs. Before this House can say whether this order is right or not, it is necessary to know what was the case on which Hawkins J. directed judgment, which this order reverses, to be entered for the defendants. The writ was issued on the 27th of December 1882.

There was an alternative defence that the causes of action did not, nor did any of them, first accrue to the plaintiff at any time within six years before the commencement of the action; and therefore, it lay on the plaintiff to give evidence of some cause of action subsequent to the 27th of December, 1876.

I think it sufficiently appears in Hawkins J.'s judgment, that the defendants had worked out the seams of coal of which they were lessees as long ago as 1868, and that they had done nothing from that time. And as the defendants seem to have proved and relied on the fact that very considerable subsidences had occurred between 1868 and 1871, which injured the plaintiff's premises, and that the defendants had been called upon to do and had paid for repairs rendered necessary, it is clear that the original working was such as to give rise to a cause of action as early as 1871,

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and that the plaintiff had then known it. *Lamb* v. *Walker* (1) was then cited. With a view to enable the plaintiff's counsel to fully consider that authority, it was arranged that the jury should be discharged, and that the case should be reserved for further consideration, it being expressly admitted by the plaintiff that damage was done by subsidence in 1868.

On further consideration, the plaintiff's counsel is stated by Hawkins J. to have admitted that judgment must be entered for the defendants unless *Lamb* v. *Walker* (1), which he intended to question in a Court of Appeal, was overruled.

I think it convenient here to see what was the decision in *Lamb* v. *Walker* (1), so as to see whether, while it stands unreversed, it was decisive of the case before Hawkins J. Manisty J. (at p. 391) quotes so much of the plaintiff's statement of claim as was material in that case. There was a first claim, on which the referee gave $\frac{1}{4}d.$, which I do not notice. I think the fifth and sixth paragraphs are in effect the same as the amended statement of claim in the action now at bar, and set out in the Appendix, p. 7. But the only plea in *Lamb* v. *Walker* (1) was payment into Court of £150, and the issue joined was whether that was enough. That was referred, and it was on the award that the question was raised. The two material findings on the award are stated at p. 392:—"2. I estimate the damage actually sustained by the plaintiff at the date of the commencement of the action . . . at £400. 3. I estimate the future damage which will be sustained by the plaintiff . . . at £150." He therefore directed judgment to be entered at £400, deducting the £150 paid into Court from those two sums, amounting together to £550.

The question was raised on a rule to reduce the damages, and was "whether the plaintiff was in point of law entitled to recover the sum of £150 which the referee finds will be sustained by the plaintiff by reason of the defendant's acts." The decision in *Lamb* v. *Walker* (1) was that he was so entitled. And I think it was rightly thought that if damages subsequent to a writ issued in 1871 could be recovered in an action on that writ, they were included in the cause of action then existing, and consequently that decision, which was binding on Hawkins J., was at that stage of the proceedings conclusive against the plaintiff.

(1) 3 Q. B. D. 389.

In *Lamb* v. *Walker* (1) Cockburn L.C.J. differed from the majority of the Court. He said: "Taking the view I do of the leading case of *Backhouse* v. *Bonomi* (2), I am unable to concur in holding that in addition to the amount to which he may be entitled for actual damage sustained through the excavation of the adjacent soil by the defendant, the plaintiff is entitled to recover in respect of prospective damage, that is to say, anticipated damage expected to occur, but which has not actually occurred and which may never arise." He enters into elaborate reasoning to support this opinion, which I shall examine presently. I think if that opinion had prevailed in *Lamb* v. *Walker* (1), and a judgment had been given accordingly, that decision would have been, not only not an authority against the plaintiff in this case, but an authority in his favour as far as the defence of the Statute of Limitations is concerned.

There must have been some understanding between the counsel for the plaintiff and for the defendants in this case as to what was to be done in case the final decision on this very important question was in conformity with the opinion of Cockburn L.C.J. And I think, though I wish it had been expressly stated, it must now be taken that the defendant's counsel agreed that he would not, on the evidence then before the Court, ask for a verdict on any of the other defences, but would in that case consent to have the damages settled by arbitration.

Cockburn L.C.J. could not in *Lamb* v. *Walker* (1) have meant to go so far as to say that if a house had been shaken, and was evidently going to fall, but had not yet completely fallen when the writ issued, the plaintiff could only recover for what had already occurred, and would have to bring a fresh action when a further chimney fell. He has not quite sufficiently guarded himself from saying so.

In the present case, there being obscurity in the statement of the facts, it was, somewhat late in the day, but, with the assent of the House, agreed to add this further admission: "That if the owner of the adjoining land (one Cooper) had not worked his coal, there would have been no further subsidence, but the appellants (defendants) admit that if the coal under the respondent's (plaintiff's) land had not been taken out, or if the appellants

(1) 3 Q. B. D. 389. (2) 9 H. L. C. 503.

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(defendants) had left sufficient support under respondent's (plaintiff's) land, then the working of the adjoining owner would have done no harm." I do not understand this to be an admission that the subsidence was occasioned by the removal by the defendants of other coal than that the removal of which occasioned the subsidence in 1871. Such an admission would have raised a different question, and one the solution of which might have required a further investigation as to the facts.

I will now proceed to consider the case exactly as if it was on appeal from *Lamb* v. *Walker*. (1)

I must first observe that Manisty J. in that case says (2): "It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all." And it is not disputed by Cockburn L.C.J. that the rule is established that "damages resulting from one and the same cause of action must be assessed and recovered once and for all." (3) He joins issue with Manisty J. on the application of this rule to cases arising from subsidence occasioned by mining so as to remove support. And I think that this rule is established as the general rule of law. I do not think it is one of those rules of law which depend upon natural justice. I think it is an artificial rule of positive law introduced on the balance of convenience and inconvenience. I think that if it were res integra a great deal might be said against the expediency of the rule. I know nowhere where the objections to the expediency of the rule are more clearly and forcibly stated than by the Lord Chief Justice. (4)

But I think it was not disputed in the argument that at all events when the act complained of is one which would entitle the plaintiff to maintain an action, and recover, as a matter of law, at least nominal damages, without any proof of damage in fact, the rule is firmly established, and I think all three judges in the Court below agree that the question is what was the cause of action in this case. They adopt the reasoning of Cockburn L.C.J. in *Lamb* v. *Walker* (1) that it logically follows, from *Bonomi* v. *Backhouse* (5) that there are independent and distinct causes of action, on each fresh distinct cause of damage, though arising

(1) 3 Q. B. D. 389.
(2) 3 Q. B. D. 394.
(3) 3 Q. B. D. 403.
(4) 3 Q. B. D. 405.
(5) E. B. & E. 622.

from the same act of disturbing the soil. Fry L.J. puts this very clearly. He does not think that it is concluded by authority, and says "I think we are bound to determine this question on principle. Now with reference to principle it appears to me to be plain that all damages which result from one and the same cause of action must be recovered at one and the same time, and therefore we are driven to the inquiry What is the cause of action in a case of this description?" In this I completely agree, but I have not been able to agree with the reasoning by which it is sought to be made out that it logically follows, from the decision in *Backhouse* v. *Bonomi* (1) in this House, that there are fresh causes of action at each fresh subsidence arising from the old disturbance of the strata occasioning fresh damage to the same property. I decide nothing on a question which does not here arise, viz., whether, if the same person has two separate tenements, say A. on the north of the seam worked by the defendant and B. on the south of it, and damage has actually occurred to A., and he sues for the damage done to it, he is bound to join in the action any claim which he has or hereafter may have as to B. Whilst the recent decision of *Brunsden* v. *Humphrey* (2), in the Court of Appeal stands unreversed (and I do not mean to cast any doubt on it) it would seem that he is not.

It is desirable to see what the case of *Bonomi* v. *Backhouse* (1) really was. The writ was issued on the 20th of May, 1856. The declaration alleged that the plaintiffs, as reversioners of certain buildings in the occupation of Parkin, were entitled to have the said messuages and buildings supported by the mines and soil "contiguous and near to and under the said messuages and buildings," and then in the usual way alleged working by the defendant, disturbing the support, by which the walls of the said messuages were cracked and injured, and the ground on which the said messuages and buildings stood subsided. The pleas were,—1, not guilty; 2, denial of Parkin's occupancy as tenant as alleged; 3, denial of the reversion being in the plaintiffs as alleged; 4, that the plaintiffs were not entitled to have the said messuages and buildings or either of them supported, to wit, by the mines, earth, and soil underground contiguous;

(1) E. B. & E. 622. (2) 14 Q. B. D. 141.

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5, that the said alleged causes of action did not accrue within six years before this suit. The verdict was entered for the plaintiffs, subject to a special case. One very important question raised in and decided by that case was as to the rights of buildings to support, as distinguished from the rights of the natural soil to the support; with that we are not now concerned. The arbitrator in detail stated very clearly, and, I have no doubt, very accurately, the way in which the cleety coal in the Auckland coal-field was worked. I doubt if this account would be found to be applicable in most coal-fields. I think I may say that it would not in some. I do not know what is the nature of the strata in the Yorkshire coal-field where the present coal lies. But it appeared quite clear on his statement of the case that, though it was apparent in 1850, more than six years before the action, that unless steps were taken to stop the progress of the thrust then in operation, the plaintiff's houses would be injured by the thrust, yet no actual injury was sustained until 1854, less than six years before the action; he also found that the thrust would continue and would produce damage in future. There was also a finding at page 631, that it was possible to stop the thrust, "but the expense of so doing would have been very great, and would on the whole have amounted to a much larger sum than the value of the property injured." He then proceeded to find in detail the facts on which it was to depend how the issues should be entered, and then proceeded as follows:—"If the verdict is to be entered for the plaintiffs upon the issues joined on the 1st, 4th, and 5th pleas, another question for the Court is, 4, whether the defendant is responsible for all the damage which has been sustained by the plaintiffs by reason of the injuries to their said messuages and buildings above described, or for any and what part of that damage, *and whether he is responsible in any and what respect for the probable future damage which may be occasioned in manner above described*, or for the damage occasioned by the diminution in value of the said messuages and buildings by reason of their insecure state and condition, or the injuries which will probably be hereafter occasioned by the further progress of the thrust as above mentioned." Had this question, and more especially the part of it I have marked in italics, been answered, it

would have decided the question afterwards raised in *Lamb* v. *Walker* (1). But as the majority of the Queen's Bench decided that the issue on the 5th plea should be entered for the defendant, the fourth question required no answer from those three judges and received none. Wightman J. does give an answer at page 638, which I think, as far as it goes, is in favour of Cockburn L.C.J.'s view in *Lamb* v. *Walker* (1).

The defendants do not appear to have thought the fourth question of importance, for nothing whatever was said in the argument in the Exchequer Chamber about it; and though the expression in the judgment indicates approval of *Nicklin* v. *Williams* (2), so far as regarded the principle "that no second or fresh action can, under such circumstances, be brought for subsequently accruing damage, all the damage consequent upon the unlawful act being in contemplation of law satisfied by the one judgment or accord" and seems in favour of the view taken by the majority in *Lamb* v. *Walker* (1), yet I do not think it can be properly said that the Court of Exchequer Chamber in their judgment put their minds to that question, which was not much, if at all, argued before them. Before the case was taken into this House the damages were agreed on at £500, how or on what principle we do not know; and that being so, the House had no occasion to decide anything on that fourth question. There seems to have been no allusion to it in the argument, and I think no one of the Lords makes any reference to it.

I think that *Bonomi* v. *Backhouse* (3) does decide that there is no cause of action until there is actual damage sustained, and does decide that the Court of Exchequer erred when in *Nicklin* v. *Williams* (2) they said that there was an injury to the right as soon as the support was rendered insufficient, though no damage had occurred. But I do not think that it all follows from this that the act of removing the minerals to such an extent as to make the support insufficient is an innocent act rendered wrongful by the subsequent damage. That would be a great anomaly, for I think there is no other instance in our law where an action lies in consequence of damage against a person doing

(1) 3 Q. B. D. 389. (2) 10 Ex. 259.
(3) 9 H. L. C. 503.

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an innocent act. There are many where no action lies against the doer of an improper act, unless and until damage accrues. One is alluded to by Lord Cranworth. The cause of action against the speaker of words not actionable per se consists in the speaking of the words and the damage. It was therefore held in *Littleboy* v. *Wright* (1), on error from the Palace Court, that an inferior Court had no jurisdiction over an action for calling the plaintiff a whore, whereby the plaintiff lost her marriage, unless both the speaking of the words and the loss of the marriage were averred and shewn to have occurred within the jurisdiction. But the cause of action was as much the speaking of the words as the damage. It is quite clear that if the words were spoken under such circumstances as to be privileged, no amount of damage could give rise to an action. So where a man beats another's servant, no action arises to the master until there is damage by the loss of the service, but no amount of damage would give the master an action if the beating was justifiable. And if a man in breach of the duty to take reasonable care in the management of a horse in a public street gallops along it, no action lies except at the instance of a person who has suffered damage. But no amount of damage will give a cause of action against the owner of the horse unless a breach of duty is shewn. And I think that there is a duty in the owner of land on which his neighbour's land rests to respect it, and take care that he does not injure that support. This is subject to many qualifications, some of which were considered in *Birmingham* v. *Allen* (2). All I think that is really decided in *Bonomi* v. *Backhouse* (3), at least in this House, is that where there is a breach of that duty, followed by damage, there is a cause of action; and that until there is damage there is no more cause of action for the breach of duty than there would be in a person who saw the breach of duty in the reckless rider of a horse, but was not damaged, though in peril.

Littledale J. said in *Hodsoll* v. *Stallebrass* (4), speaking of an action by a master for beating his servant per quod servitium amisit: "It is argued that a fresh action might be brought from

(1) 1 Lev. 69.
(2) 6 Ch. D. 284.
(3) 9 H. L. C. 503.
(4) 11 A. & E. 301.

time to time; but that is not so, the action being founded, not upon the damage only, but upon the unlawful act and the damage. Without the special damage, this action would not be maintainable at the plaintiff's suit: A fresh action could not be brought unless there were both a new unlawful act, and fresh damage."

This I think indicates the real principle. No authority was cited on the argument against this except a dictum of North C.J. in the report of *Lord Townshend* v. *Hughes* (1), where he is reported to have said: "This is a civil action brought by the plaintiff for words spoken of him, which if they are in their own nature actionable, the jury ought to consider the damage which the party may sustain; but if a particular averment of special damages makes them actionable, then the jury are only to consider such damages as are already sustained, and not such as may happen in future, because for such the plaintiff may have a new action." North C.J. was a great lawyer, and, though at the moment engaged in maintaining what seems a very bad cause, no dictum of his is to be slighted. But this, if he did say it, was utterly irrelevant, for his opinion was that the words spoken were actionable, without any special damage, such, in the case before him, being neither averred nor proved. I cannot, therefore, attach much weight to this dictum, and it has never, I think, been acted upon. I come, therefore to the conclusion that the opinion of the majority in *Lamb* v. *Walker* (2) was the better opinion.

I should say that I take a very different view of *Whitehouse* v. *Fellowes* (3) from that taken by the Master of the Rolls. I think that was an action for maintaining a nuisance, which from time to time caused fresh damage. What Williams J. there says, is: "The true answer to this objection, as it seems to me, is that no fresh cause of action arises from each fresh damage, but that where there is not only a fresh damage, but a continuance of the cause of damage, such continuance of the wrongful act which caused the damage constitutes a fresh cause of action."

This was how the Court of Error in Ireland understood that case in *Devery* v. *Grand Canal Co.* (4). So understanding it, and

(1) 2 Mod. 151.
(2) 3 Q. B. D. 389.
(3) 10 C. B. (N.S.) 765, 784.
(4) 9 Ir. Rep. C. L. 194.

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approving of it, Palles C.B. in that case gave judgment for the plaintiff. How that case is in any way in conflict in principle with *Nicklin* v. *Williams* (1) I am unable to perceive.

Bowen L.J. says that, "Applying the reasoning in *Whitehouse* v. *Fellowes* (2), it seems to me that there has really been not merely an original excavation or act done, but a continual withdrawal of support." If I could take that view of the facts, I should agree in the conclusion. But I cannot take that view of the facts. One consequence of doing so would be that where the owner in fee of a seam of coal worked it out, and died leaving it in this state, the heir of the land in which the worked out seam lay would be liable to an action for continuing a nuisance. Surely, the facts cannot be such as would produce that effect. And unless they are, I do not think that they can make the defendants responsible on this ground.

I therefore think that the order appealed against should be reversed, and the judgment of the 18th of December 1883 restored. The noble and learned Lords who heard the case have each of them come to an opposite conclusion, and the Order of the House will be in conformity with their view.

LORD BRAMWELL:—

My Lords, laying down general propositions is attended with the same danger as giving definitions. Some necessary qualification or exception is generally omitted. Moreover, such propositions are often and justly called "obiter." With these dangers before my eyes, I shall nevertheless venture on some abstract propositions.

It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause of action, he must, if he sues in respect of it, do so once and for all. As, if he is beaten or wounded, if he sues he must sue for all his damage, past, present, and future, certain and contingent. He cannot maintain an action for a broken arm, and subsequently for a broken rib, though he did not know of it when he commenced his first action. But if he sustained two injuries from a blow, one to his person, another to his property, as, for instance, damage to a watch, there is no doubt that he could maintain two actions in respect of the

(1) 10 Ex. 259. (2) 10 C. B. (N.S.) 765, 784.

one blow. I may apply the test I mentioned in the argument. If he became bankrupt, the right in respect of the watch would vest in his trustee. That for damage to his person would remain in him. I have put the case of a trespass. The same would be true of an action for consequential damages. A man slandered or libelled by words actionable in themselves must sue, if at all, for all his damage in one action. Probably, if he sustained special damage, as that he lost a contract through being charged with theft, he might maintain one action for the actionable slander, another for the personal loss,—certainly if the case in Siderfin is right. But it is not necessary to decide this.

I now come to the case of where the wrong is not actionable in itself, is only an injuria, but causes a damnum. In such a case it would seem that as the action was only maintainable in respect of the damage, or not maintainable till the damage, an action should lie every time a damage accrued from the wrongful act. For example, A. says to B. that C. is a swindler, B. refuses to enter into a contract with C., C. has a cause of action against A.; D., who was present and heard it, also refuses to make such a contract; surely another action would lie. And so one would think if B. subsequently refuses another contract. Of course, one can see that frauds might be practised. So they may in any state of law. But I cannot see why the second action would not be maintainable if the second loss was traced to the speaking. And perhaps one might apply the same test. Would not the first right of action pass to the trustees of C. if he became bankrupt? If the second loss was after the bankrupt's discharge, it would not.

There is still another class of cases to be considered, viz., those where the act causing damage is not in itself wrongful. No easier case can be taken than the above ground case of an excavation, whereby an adjoining owner's soil is let down. It cannot be said that the act of excavation is unlawful. A contract to do it could be enforced. No injunction against it could be obtained unless injury was imminent and certain. What would be the rights of the person damaged in such a case? I think the former reasoning would apply. If there was an excavation 100 yards long, and fifty feet of the neighbouring soil fell in, the right of

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action would be in respect of those fifty feet, and not only in respect of what had fallen in, but what would in future fall in along the fifty feet. But if afterwards the other fifty feet fell in there would be a fresh cause of action. Surely this must be so. If ten feet at one end fell in and afterwards ten feet at the other, it would be impossible to say that there would not be two causes of action. If the excavation was on two sides of a square, the same consequences. The Attorney-General denied this, and was driven to do so. But suppose A. owned the adjoining property on one side, and B. that which was at right angles to it, there must then be two causes of action.

Now apply this reasoning to the present case. There are by the admission of the parties two separate and distinct damages caused to the plaintiff by the acts, including in that word omissions, of the defendants. One a removal of coal and non-providing of supports, which caused a subsidence in 1868. A cause of action accrued then. Another cause of action is the removal of coal, including perhaps the coal which caused the first subsidence, but doubtless also a removal of coal extending to a greater distance, and not immediately under the plaintiff's land, and the non-providing against the consequences; which, when the adjoining owner to the defendants removed his coal, as he lawfully might (though I think that immaterial), caused a creep in the defendants' land, which in time caused the further subsidence. I think this gives a second cause of action. I think, therefore, the judgment was right.

It seems to me not to matter that the subsidence was of the same spot, nor that the immediate cause of the second subsidence was the non-existence of coal underneath that spot. Two damages have been occasioned to the plaintiff, one directly and immediately by the removal of the coal under his surface: the other by that and removal of other coal, and consequent creeping and further subsidence. The Attorney-General, as I have said, denied that there could be two causes of action if two different parts of the plaintiff's land subsided at two different times. But surely there must be. Suppose the two pieces belonged to different owners, as I have suggested.

Of course one can see the danger and inconvenience that will

follow. This damage accrues many years after the defendants' act or omission which has caused it. If my reasoning is right, many years hence there might be a further action from some further subsidence. But the inconvenience is as great the other way. For if the defendants are right, it follows that on the least subsidence happening, a cause of action accrues once and for all, the Statute of Limitations begins to run, and the person injured must bring his action, and claim and recover for all damage, actual, possible, or contingent for all time.

As to the authorities, *Bonomi* v. *Backhouse* (1) seems clearly in the plaintiff's favour. Indeed I have thought of limiting my judgment to the following remark on it. It decided that the excavation of the coal was not wrongful, and that the cause of action accrued when the damage arose. The damage now complained of arose at the last subsidence. That subsidence was no part of or continuance of the former subsidence, nor caused by the same cause only, but by a further cause, in this sense, that without this cause the subsidence would not have taken place. Therefore no cause of action in respect of it arose till it happened.

LORD FITZGERALD:—

My Lords, the real, though not the formal question for your Lordships' determination is whether *Lamb* v. *Walker* (2) was correctly decided. My noble and learned friend (Lord Blackburn) rightly deals with this appeal in the same light as if it was an appeal from *Lamb* v. *Walker* (2). I do not propose to follow my noble and learned friend in his instructive examination of *Lamb* v. *Walker* (2), and *Backhouse* v. *Bonomi* (3), and his criticisms on those cases, but I think that we may deduce from the authorities some propositions as now settled in law, and applicable to the circumstances of the appeal now before your Lordships' House, and to similar cases:—I proceed to state those propositions though in doing so I am conscious of the danger pointed out by my noble and learned friend, Lord Bramwell.

1. That the owner of the surface has a natural and legal right to the undisturbed enjoyment of that surface in the absence of any binding agreement to the contrary.

(1) 9 H. L. C. 503. (2) 3 Q. B. D. 389.
(3) 9 H. L. C. 503.

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Lord FitzGerald.

2. That the owner of the subjacent minerals may excavate and remove them to the utmost extent, but should exercise that right so as not to disturb the lawful enjoyment of the owner of the surface.

3. That the excavation and removal of the minerals does not, per se, constitute any actionable invasion of the right of the owner of the surface, although subsequent events show that no adequate supports have been left to sustain the surface.

4. But that, when, in consequence of not leaving or providing sufficient supports, a disturbance of the surface takes place, that disturbance is an invasion of the right of the owner of the surface, and constitutes his cause of action.

The foundation of the plaintiff's action then seems to be that although the excavations of the minerals were acts by the defendants in the lawful enjoyment of their own property, yet when subsequently damage arose therefrom to the plaintiff in the enjoyment of his property, the defendants became responsible.

For although the law encourages a man to the free use of his own property, yet, if in doing a lawful thing in the enjoyment of that property he occasions damage to his neighbour which might have been avoided, he will be answerable for that damage whenever it occurs.

Now as to the cause of action in 1868, there is no doubt that the mere excavation prior to or in 1868 was legitimate, and not of itself alone the foundation of any right of action, but when the subsidence of that year took place and caused damage to the plaintiff's houses, then the defendants became liable to make good that loss, because though their acts were in the lawful use of their own property, yet the injurious consequences to the plaintiff might have been avoided. It is the disturbance then, when it arises, that is the cause of action, and not the prior legitimate acts of the owners of the minerals in the lawful enjoyment of their own property.

But although this be true, yet still the question which arose in *Lamb* v. *Walker* (1), and which was not expressly decided by this House in *Backhouse* v. *Bonomi* (2), remains now to be considered and finally decided. There was a subsidence in 1868, causing special damage, giving the plaintiff a cause of action, and in

(1) 3 Q. B. D. 389. (2) 9 H. L. C. 503.

respect of that damage he accepted compensation, which, it seems agreed, is equivalent to a recovery of damages in an action if such an action had then been instituted.

In 1882 a fresh and distinct subsidence took place, causing special damage to the plaintiff.

It was admitted before your Lordships, rather late in the argument, but for the purpose of better enabling your Lordships to come to a conclusion :—" That after the partial subsidence in 1868 the strata remained practically quiescent until the working of the coal in the next adjoining land by the owner thereof in the year 1881, which working caused a creep and a further subsidence." And further:—" That if the owner of the adjoining land had not worked his coal there would have been no further subsidence, and that if the coal under the respondent's (plaintiff's) land had not been taken out, or if the appellants (defendants) had left sufficient support under the respondent's (plaintiff's) land, then the working of the adjoining owner would have done no harm."

It will be observed on these admissions that the partial subsidence of 1868 had practically ceased, and that a fresh creep and subsidence took place in 1882, which would not have taken place if the defendants had left sufficient natural support under the plaintiff's land, or, we may add, had substituted adequate artificial support.

There can be no doubt that though there has been no act of commission by the defendants since the completion of the excavation of 1868, yet if there had been no subsidence causing damage to the plaintiff prior to that of 1882, the present action could be maintained; but it is alleged that as the plaintiff had a complete cause of action in 1868, arising from the prior excavation and the subsidence of 1868, the Statute of Limitations then commenced to operate, and has barred the present action. It was further argued that in 1868 the plaintiff could and ought to have insisted on recovering once and for all any damage that might arise prospectively from the excavation of 1868, according to the rule of law which, in order to prevent a multiplicity of actions, provides that damages resulting from one and the same cause of action must be assessed and recovered once and for all.

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That rule was applied by the majority of the Court in *Lamb* v. *Walker* (1), and is not controverted. It is not inflexible, and admits of exceptions.

We have to consider what was the cause of action in 1868, and whether the cause of action of 1882 (the creep and subsidence of 1882), is one and the same cause of action as that of 1868. If it is so, then the defendants are entitled to succeed on the defence of the Statute of Limitations.

This appeal represents a class of cases peculiar and exceptional, to meet which and to avoid grave inconvenience, if not injustice, our flexible common law has somewhat moulded itself. I deprecate discussing some of the arguments addressed to us, which seemed to me to be too fine, such as for instance whether the original act of the defendants was "innocent," or "perfectly innocent." The question here is not whether the original act of the defendants was "innocent," but whether the defendants have occasioned damage to the plaintiff without any inevitable necessity.

I am of opinion that Cockburn L.C.J. in the case of *Lamb* v. *Walker* (1), and the Court of Appeal in the case before us, were respectively right in resting on *Backhouse* v. *Bonomi* (2), and deducing from it a principle which governs the question.

Backhouse v. *Bonomi* (2) is not satisfactorily reported. We gather from the report in your Lordships' House with some difficulty what was actually decided. Mr. Manisty, in his argument in that case at your Lordships' bar, puts it thus:—"The act done was a perfectly innocent act at the time it was done; the argument on the other side is that it must be treated as having been injurious because it might afterwards become so. If the action had been brought when the act was first done, the answer would have been that the defendant had a right to do the act, and that no damage had been occasioned." Lord Westbury, says, "I think it is abundantly clear, both on principle and authority, that when the enjoyment of the house is interfered with by the actual occurrence of the mischief, the cause of action *then* arises, and the action may *then* be maintained." And Lord Cranworth, adds:—"It has been supposed that the right of the party whose land is interfered with is a right to what is called the pillars or the

(1) 3 Q. B. D. 389. (2) 9 H. L. C. 503.

support. In truth, his right is to the ordinary enjoyment of his land, and until that ordinary enjoyment is interfered with he has nothing of which to complain. That seems the principle on which the case ought to be disposed of."

It seems to me that *Backhouse* v. *Bonomi* (1) did decide that the removal of the subjacent strata was an act (I will not say an innocent act) done in the legitimate exercise of ordinary ownership, which, per se, gave no right of action to the owner of the surface, and that the latter had no right of action until his enjoyment of the surface was actually disturbed. The disturbance then constituted his right of action.

There was a complete cause of action in 1868, in respect of which compensation was given, but there was a liability to further disturbance. The defendants permitted the state of things to continue without taking any steps to prevent the occurrence of any future injury. A fresh subsidence took place, causing a new and further disturbance of the plaintiff's enjoyment, which gave him a new and distinct cause of action.

If this view is correct, then it follows that the cause of action now insisted on by the plaintiff is not the same cause of action as that of 1868, but is in point of law, as it is physically, a new and independent cause of action arising in 1882, and to which the defence of the Statute of Limitations is not applicable.

The necessary conclusion is that *Lamb* v. *Walker* (2) was not correctly decided, and that the able reasoning of Cockburn L.C.J. in that case ought to have prevailed.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 8th Feb. 1886.

Solicitors for appellants: *S. B. Somerville for Baxter & Co., Doncaster.*

Solicitors for respondent: *Ridsdale & Son for Saunders, Nicholson, & Reeder, Wath, near Rotherham.*

(1) 9 H. L. C. 503. (2) 3 Q. B. D. 389.

[HOUSE OF LORDS.]

H. L. (E.) 1886 *April* 16.

THE METROPOLITAN RAILWAY COMPANY . . . . . } APPELLANTS;

AND

MARY ANN WRIGHT . . . . . RESPONDENT.

Practice—New Trial—Verdict against Evidence—Principle on which New Trial allowed.

A new trial ought not to be granted on the ground that the verdict of the jury was against the weight of the evidence, unless the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find.

Observations by Lord Halsbury on *Solomon* v. *Bitton* (8 Q. B. D. 176).

APPEAL from a decision of the Court of Appeal.

The respondent, a passenger on the appellants' line, stepped out of a train at King's Cross Station, and was by the motion of the train thrown on to the platform, sustaining injuries in respect of which she brought this action. At the trial before Huddleston B. and a special jury in July 1884 the plaintiff's case was that the company's servants were guilty of negligence in not looking out and not answering her calls for assistance and in allowing the train to move on after she had begun to alight. The defendants' case was that there was no negligence on their part; that the train had begun to move before the plaintiff had begun to alight, and that the accident was caused or contributed to by her negligence. Upon these points there was conflicting evidence; the plaintiff being called on the one side, and several of the company's servants on the other.

The jury found a verdict for the plaintiff for £300. The Divisional Court (Lord Coleridge C.J. and Stephen J.) ordered a new trial on the ground that the verdict was against the weight of the evidence. The Court of Appeal (Earl of Selborne L.C. Brett M.R. and Lindley L.J.) on the 7th of March 1885 reversed this decision and ordered the verdict to stand. In the course of giving judgment the following observations were made:—

EARL OF SELBORNE L.C.:—

We all think that there are not sufficient grounds for a new trial in this case. As the verdict was not perverse or unreasonable, looking to the evidence given, it does not seem to us to be a case in which the decision of the jury, who are the proper judges of such questions, should be interfered with. The damages are, I think, plainly not excessive, if the verdict is right, or if the verdict was one which the jury, in the exercise of their proper judgment, were entitled to give. In many cases the principles on which new trials should be granted on the ground of difference of opinion which may exist as to the effect of the evidence have been considered, both in the House of Lords, and in the lower Courts, and I have always understood that it is not enough that the judge, who tried the case, might have come to a different conclusion on the evidence than the jury, or that the judges, in the Court where the new trial is moved for, might have come to a different conclusion, but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable, and almost perverse, that the jury when instructed and assisted properly by the judge should return such a verdict. If I am at all right in that view, then I may say I cannot come to the conclusion that this is a verdict which upon the evidence before them the jury were not well entitled to find.

BRETT, M.R.:—

I only desire to add this, that the principle on which the Court is entitled to interfere with the verdict of a jury has been laid down by the Lord Chancellor in precisely the same terms as it has over and over again been laid down in this Court when he is not here, and that he has examined into this case precisely on the same principles on which we have examined into every case that has been brought before us. I agree with every word the Lord Chancellor has said.

LINDLEY, L.J.:—

So do I.

From this decision the defendants appealed.

H. L. (E.) 1886 METROPOLITAN RAILWAY CO. v. WRIGHT.

April 15. *J. F. Moulton* Q.C. and *J. Lawson Walton*, argued for the appellants that the verdict was against the weight of evidence.

This case being reported solely for the observations made upon *Solomon* v. *Bitton* (1), and upon the principle on which new trials against evidence ought to be granted, it is not necessary to refer to the arguments.

Roland Vaughan Williams, for the respondent was not heard, the Lord Chancellor announcing that judgment would be given the following day.

April 16, LORD HERSCHELL, L.C. :—

My Lords, this was an action brought by the plaintiff to recover damages from the Metropolitan Railway Company for the injuries sustained by her, owing to an accident which occurred at the King's Cross Station on the line of that company, whereby she suffered certain bodily harm. The case was tried before a jury who found a verdict for the plaintiff for £300. Upon the motion of the defendants a Divisional Court of the Queen's Bench Division granted a new trial on the ground that the verdict was against the weight of evidence. From that judgment there was an appeal to the Court of Appeal, who reversed the decision of the Court below holding that the verdict ought to stand.

The question which we have to determine is, not what verdict we should have found, but whether the Court of Appeal were wrong in holding, as they have done, that the verdict was not against the weight of evidence. The case was one unquestionably within the province of a jury; and in my opinion the verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find.

[His Lordship reviewed the evidence in detail and concluded thus :—] I am not prepared to say that a jury might not reasonably find that the accident was due to the negligence of the defendants' servants.

I therefore move your Lordships that the judgment under appeal be affirmed, and that the appeal be dismissed with costs.

(1) 8 Q. B. D. 176.

LORD WATSON concurred.

LORD FITZGERALD:—

My Lords, I concur in the conclusion announced by the noble and learned Lord on the woolsack, and I should not add a word but that it is very desirable that we should understand the grounds upon which the Courts exercise a control over the verdict of a jury once found. In this case there was evidence given at the trial on both sides, and on all the issues, proper to be submitted to and considered by the jury. Such appears to have been the opinion of the Divisional Court, and it was clearly that of the Court of Appeal. The judge who presided at the trial could not properly have withdrawn the case from the jury. The jury gave their verdict for the plaintiff.

The judgment of the noble and learned Earl who presided in the Court of Appeal imports that a verdict once found is not to be set aside unless it appears to be a verdict perverse or almost perverse. If my recollection does not mislead me, we have departed in this House, in several instances, from the old rule which introduced the element of "perversity," and have substituted for it that the verdict should not be disturbed unless it appeared to be not only unsatisfactory, but unreasonable and unjust. The question, then, for your Lordships' consideration is whether the evidence so preponderates against the verdict as to shew that it was unreasonable and unjust. I am of opinion that the appellants, upon whom the onus lies, have failed to establish that this verdict was unreasonable or unjust, and therefore, I think that it ought not to be disturbed. There is no principle at stake, and there is nothing involved in the case save the amount of the verdict.

LORD HALSBURY:—

My Lords, the facts of this case may of course be differently viewed by different minds. I am content with the view of the facts as stated by the Lord Chancellor, and I am disposed to think that I should have found the same verdict. But what I take to be of supreme importance, as defining the functions of judges and juries, is the principle upon which a new trial can be granted

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upon the ground that the verdict is against the weight of the evidence.

Now I think that the principle laid down in *Solomon* v. *Bitton* (1) is erroneous, as reported, in the use of the word "ought." If a Court—not a Court of Appeal in which the facts are open for original judgment, but a Court which is not a Court to review facts at all,—can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their own view of what the evidence in their judgment proves. That, I think, is not the law. If reasonable men *might* find (not "ought to" as was said in *Solomon* v. *Bitton* (1)) the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confided to juries, not to judges.

My noble and learned friend on the woolsack has put the proposition in a form which is not open to objection, but which perhaps leaves open for definition in what sense the word "properly" is to be used. I think the test of reasonableness, in considering the verdict of a jury, is right enough, in order to understand whether the jury have really done their duty. If their finding is absolutely unreasonable, a Court may consider that that shews that they have not really performed the judicial duty cast upon them; but the principle must be that the judgment upon the facts is to be the judgment of the jury and not the judgment of any other tribunal. If the word "might" were substituted for "ought to" in *Solomon* v. *Bitton* (1) I think the principle would be accurately stated.

I concur in the motion of my noble and learned friend on the woolsack that this appeal should be dismissed with costs.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 16th April 1886.

Solicitors for appellants: *Fowler & Perks.*
Solicitor for respondent: *W. T. Boydell, Jun.*

(1) 8 Q. B. D. 176.

[PRIVY COUNCIL.]

THE EXCHANGE BANK OF CANADA AND OTHERS . . . . . } APPELLANTS;

AND

THE QUEEN . . . . . RESPONDENT.

J. C.* 1885 *Dec.* 18, 19.

1886 *Feb.* 18.

(CONSOLIDATED APPEALS.)

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, LOWER CANADA.

Rights of the Crown in Lower Canada—Priority of Payment in respect of the Crown's "Comptables"—Sect. 1994 *of Civil Code—Sect.* 611 *of Civil Procedure Code—Conflict between the Codes—Construction.*

Held, that the Crown is bound by the two Codes of Lower Canada, and can claim no priority except what is allowed by them. Being an ordinary creditor of a bank in liquidation, it is not entitled to priority of payment over its other ordinary creditors.

Prior to the Codes the law relating to property in the province of Quebec was, except in special cases, the French law, which only gave the King priority in respect of debts due from "comptables," that is, officers who received and were accountable for the King's revenues.

Art. 1994 of the Civil Code must be construed according to the technical sense of "comptables." And

Art. 611 of the Civil Procedure Code, giving to the Crown priority for all its claims, must be modified so as to be in harmony therewith. Accordingly, by its true construction, the intention of the Legislature was that "in the absence of any special privilege the Crown has a preference over unprivileged chirographic creditors for sums due to it by the defendant being a person accountable for its money."

APPEAL from two judgments of the Court of Queen's Bench (April 2, 1885, Monk, Ramsay, and Baby, JJ., Dorion, C.J., dissenting), reversing two judgments of the Superior Court for Lower Canada, district of Montreal (Dec. 1, 1884), which were in favour of the appellants.

The question raised was whether the Crown has any priority or privilege over other creditors in respect of a debt due from a company in liquidation.

* *Present:*—LORD FITZGERALD, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

J. C.
1885
EXCHANGE BANK OF CANADA v. THE QUEEN.

The following are the material facts of the case:—

In September, 1883, the Exchange Bank of Canada, having its principal office at Montreal, was put in liquidation under the Act 45 Vict. c. 23 (Canada), and the appellants, Campbell, Matthews, and Darling, were appointed liquidators.

On the 10th of March, 1884, the respondent, the Minister of Finance and Receiver-General of Canada, filed with the liquidators, in the name of the Queen, a claim against the estate of the bank for $237,840·24 with interest upon the sum of $200,000, at the rate of 5 per cent. per annum, from the 20th of June, 1883, stating the nature of the claim to be two deposits of $100,000 each, made on behalf of the Dominion of Canada on the 17th of April and the 12th of May respectively, for which deposit receipts were given, and a sum of $37,840·24, being the balance due on a banking account of the Dominion with the Exchange Bank, and claiming payment in priority to all other creditors.

On the 15th of March, 1884, the respondent, Attorney-General for the province of Quebec, filed with the liquidators in the name of the Queen a claim against the estate of the bank for $75,000, being the amount of a deposit made with the bank on behalf of the province of Quebec on the 8th of September, 1883, payable with interest at the rate of 5 per cent. per annum for which a deposit note was given, and demanded payment in priority to all other creditors.

On the 23rd of June, 1884, the appellant, Louis Huet Massue, instituted two suits (which may be called the Dominion suit and the Quebec suit) by filing two petitions in the Superior Court for the province of Quebec, district of Montreal, in which, as an unsecured creditor for over $20,000, he prayed to be permitted to oppose the above claims of the Crown in regard to the Dominion of Canada and the province of Quebec respectively, on behalf of himself and the other unsecured creditors, and that it might be declared that the Crown is not entitled to any privilege or priority in respect of the said debts over the ordinary unsecured creditors of the bank.

The liquidators of the bank consented to the contestation of the appellant Massue, and the Superior Court gave him leave to

contest the claim of the Crown on behalf of himself and the other unsecured creditors at the expense of the bank both in the Dominion and the Quebec suit.

On and before the 10th of July, 1884, answers on behalf of the Crown, and replications on behalf of the respondent Massue were respectively filed in both suits.

On the 10th of July, 1884, the Merchants' Bank of Canada, an incorporated company, having its principal office at Montreal, filed two petitions for intervention in the Superior Court in both the above suits as the holder of notes of the Exchange Bank issued for circulation of the nominal value of $3050, and by virtue of sect. 12 of the Banking Act, 1880 (43 Vict. c. 22, of Canada), claimed priority for these and other similar notes of the Exchange Bank over the claims of the Crown.

The Crown disputed the special privilege claimed by the Merchants' Bank, but the judgment of the Superior Court maintaining it was unanimously confirmed by the Judges in the Court of Appeal. The Crown made no appeal from these decisions, which were acquiesced in by respondents.

Both the suits came on for hearing on the 1st of December, 1884, in the Superior Court, before Mr. Justice Mathieu, who decided against the claim of the Crown.

He held that the privilege claimed by the Crown, being not a direct but an incidental privilege of the Crown, was regulated by the Civil Law of Quebec derived from the law of France, that the ancient law of France gave no privilege to the Crown in a case such as the present; and that neither the Civil Code nor the Code of Civil Procedure (and especially article 611 of the latter Code), gave any such privilege to the Crown.

In giving judgment in the Court of Queen's Bench, all the judges concurred in the opinion of Mr. Justice Mathieu:—

1. "That the privilege of the Crown, for its claim over those of private competing creditors, is to be governed by the law of Canada and not by the law of England;"
2. That the claim of the respondents is not supported by the provisions of the Civil Code of Lower Canada, nor the long established jurisprudence of the country, both which limit the general privilege of the Crown to "claims against

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persons accountable for its moneys"—comptables—Civil Code, art. 1994;

3. That the bank was not a "comptable"—or person accountable for the Crown's moneys—in the contemplation of the laws of France or of Lower Canada;

4. That in the present instance the Crown has no "special privilege" to be paid by preference.

The learned judges differed solely with regard to the interpretation of the art. 611 of the Code of Civil Procedure, under the heading: "of the sale of moveables under execution":

"In the absence of any special privilege, the Crown has a preference over chirographic creditors for sums due to it by the defendant."

Mr. Justice Ramsay regarded this article as "totally new law," and as "a very evil innovation;" but, applying the rules of interpretation of statutes, could not disregard it. The majority of the Court were "therefore constrained, most unwillingly, to reverse the judgment" of Mr. Justice Mathieu.

Chief Justice Dorion, on the other hand, sought to reconcile art. 611 with the existing jurisprudence and the provisions of the Civil Code, by construing the two Codes together as if they formed one code. He reviewed the arts. 1989 and 1994 of the Civil Code, and arts. 607 and 611 of the Code of Procedure, and declared: "My reading of these combined articles, concerning the privileged claims of the Crown, is, that when the Crown has a special privilege, its claim shall, according to art. 607, be paid by preference to all other creditors; and that when the Crown has no special privilege, its other privileged claims, that is, those mentioned in art. 1994 (which are limited to claims against 'persons accountable for its moneys'), shall be paid in preference to those of the ordinary chirographic creditors."

Sect. 1994 of the Civil Code is as follows: "The claims which carry a privilege upon moveable property are the following, and when several of them come together they take precedence in the following order, and according to the rules hereinafter declared, unless some special law derogates therefrom: . . .

(10.) To the claims of the Crown against persons accountable for its moneys—la couronne pour créances contre ses comptables."

Davey, Q.C., and *McMaster*, Q.C. (Canada) (*Trenholme* (Canada), with them), for the appellants, contended that the Crown had not the priority claimed. The claim must be decided according to the rights and prerogatives of the Crown as they existed at the time that Canada was ceded to Great Britain. Before the cession the laws in force in Canada were derived from France. At the time of the cession those laws were guaranteed to the people of the province. In 1774 the laws of Canada were secured to them in all matters relating to property and civil rights by 14 Geo. 3, c. 83, s. 8, referred to and construed in *Citizens Insurance Company of Canada* v. *Parsons* (1). Reference was made to Blackstone on King's Prerogative, see the Commentaries, ch. 7, p. 239; Chitty's Prerogative of the Crown, ch. 3, p. 25. By the French law as it prevailed before the introduction of the Codes, the priority of the Crown extended only to "comptables," who are persons accountable for its moneys, the word having in French law a technical and well-recognised meaning, namely, to describe a class of officers who had the collection and management of the Crown revenues, and were accountable therefor.

Reference was made to an Edict of 1669, and Pothier's Comment thereon, in 9 Pothier (ed. Burgnot), p. 468, No. 169; Ferrière's Dictionnaire de droit, vo. Comptable; Nouveau Denizart, vo. Comptable, vol. i., p. 576, where there is a report of a decision of the 14th of May, 1748, in the case of the Sieur Bouvelais; Sirey's Decisions, pt. 1, p. 369, where there is a case decided in 1843, and several authorities cited; Merlin's Répertoire, vo. Privilege, vol. 5, p. 902, sect. 2, para. 3, art. 4; *Attorney-General* v. *Black* (2); *Monk* v. *Ouimet* (3); *Ouimet* v. *Marchand* (4). This question, however, is now regulated by the Canadian Codes. Art. 6 of Civil Code directs that the law of Lower Canada is applicable to privileges and rights of lien, to public policy and the rights of the Crown. The provisions of the Civil Code in reference to the rights and privileges of the Crown have never been repealed, but on the contrary are "continued in force," by the British North America Act, 1867, s. 129. By the Civil Code, sects. 1989 and 1994, the Crown rights are restricted, and as regards this case, its claim of priority is only against "ses comptables." The

(1) 7 App. Cas. 111.
(2) Stewart's L. C. R. 324.
(3) 19 L. C. J. 71.
(4) 5 Revue Legale, 361.

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Exchange Bank is not the "comptable" of the Crown, according to the meaning of that word, which is a term of art under French law. As regards sect. 611 of the Civil Procedure Code, the object of that Code is not to express substantive law, but merely those provisions which relate to procedure in civil matters. The object of the article is not to repeal those articles of the Code which declare the privileges of the Crown, but to provide a rule of procedure, to prescribe details of carrying out the provisions of the Code. It should be construed as bearing on the immediate scope and object of the arts. 605, 611, not as by implication repealing the substantive law contained in the Code. The two Codes must be construed together so as to harmonize: see 31 Vict. c. 7, s. 10 (Quebec). So construed, art. 611 relates to "comptables" as provided in art. 1994 of Civil Code. Upon the point of construction the following authorities were cited: *Hawkins* v. *Gathercole* (1); *Eyston* v. *Studd* (2); *Caledonian Railway Company* v. *North British Railway Company* (3); *Carter* v. *Molson* (4).

Sir *F. Herschell*, Q.C., and *Church*, Q.C. (Canada) (*Jeune* with them), for the respondent, as represented in the two appeals by the Minister of Finance and Receiver-General of Canada, and the Treasurer and Attorney-General of Quebec, contended that the decision of the majority of the judges of the Court of Queen's Bench was correct. The case did not rest solely on art. 611 of the Civil Procedure Code, under which, when read with art. 1994 of the Civil Code, the Crown is by express enactment entitled to the right claimed. They contended (1) that the Crown has the same prerogatives in Canada as elsewhere in the Queen's dominions, and that the recent decisions of the Canadian Courts to the contrary are against reason and authority; (2) that under the French law the rights of the Crown are not so limited as was contended for on the other side; (3) the claim is made in a winding-up. While the creditors generally would be prevented from seizing the property of the bank after it had gone into liquidation, the Winding-up Acts do not mention the Crown, and consequently the Crown could have taken out execution in this case, for the Crown could not be restrained from so doing as

(1) 6 De G. M. & G. 1, 20.
(2) Plowden's Reports, 465, and see also p. 204.
(3) 6 App. Cas. 114.
(4) 8 App. Cas. 530.

private creditors could. As to this point, effect was recently given to it in the case of *In re Oriental Bank Corporation, Ex parte The Crown* (1). Then with regard to the first point, it was contended that the prerogatives, rights, and privileges of the Crown in the province of Quebec are such as existed in England at the time of the conquest of that country, and its cession by treaty to England. By virtue of such rights and privileges the Crown is entitled in Quebec, as in England, to be paid in priority to other creditors as regards debts of equal degree. Where a cession is on terms of continuing laws inconsistent with such prerogatives that would be an exception. The treaty of capitulation was referred to, arts. 41 and 42, and the treaty of peace, as shewing that the inhabitants were to become British subjects, and that their claim to be left in a different status to other subjects of the British Crown was refused: 14 Geo. 3, c. 83. Sect. 8 referred to on the other side was intended to regulate their concerns inter se, not to modify or diminish the Sovereign's prerogatives. When a constitution was given to Quebec, and afterwards to United Canada, and after that to the Dominion of Canada, no modification of the prerogative power was introduced into such constitution. Even if the treaty and statute of 1774 had modified the rights of the Crown, they revived when the people accepted the constitution. There is nothing beyond the cession and the Act upon which the appellants can found an argument that the full prerogatives of the Crown do not exist in Canada. Reference was made to Act XLIII. of 1866 (Upper Canada). With regard to the second point, by French law the privilege of the Crown did not apply solely to "comptables." Reference was made to Lebret on the Sovereignty of the Crown, pp. 427, 429—a work published in 1632. This bank having received moneys from the Crown knowing them to be Crown moneys is accountable: *In re Henley & Co.* (2).

Davey, Q.C., replied.

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Feb. 18.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The sole ultimate question in this case is whether the Crown, being an ordinary creditor of the bank which has been put in

(1) 28 Ch. D. 643. (2) 9 Ch. D. 469.

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liquidation, is entitled to priority of payment over its other ordinary creditors. That again depends on the question how the two Codes of Lower Canada are to be construed. Their Lordships think it clear, not only that the Crown is bound by the Codes, but that the subject of priorities is exhaustively dealt with by them, so that the Crown can claim no priority except what is allowed by them. If so, the other points which have been elaborately treated both in the colony and here are only of subsidiary importance, though undoubtedly they have a bearing on the construction of the Codes.

Their Lordships are also clear that the law relating to property in the province of Quebec or in Lower Canada, from 1774 to 1867 when the Codes came into force, must be taken to be the "Coutume de Paris," except in such special cases as may be shewn to fall under some other law. Probably such was the true effect of the statute 14 Geo. 3, c. 83, but at all events there has been an uniform current of decision to that effect in the colony, dating back forty years or so before the date of the Codes, which ought not now to be questioned.

The next question is whether the French law gave to the King a priority in respect of all his debts, or in respect only of those due from "comptables." There does not seem to have been any difference of opinion on the point in the colony. The three judges who decided for the Crown upon the ultimate question, and the two judges who decided the other way, all thought that the priority given by the French law extended only to "comptables." And in the appellants' case filed on the appeal from Mr. Justice Mathieu it is elaborately argued that the English law and not the French prevailed in Lower Canada, but it is never suggested that the priority now claimed could be claimed under the French law. That suggestion however has been made upon this appeal to Her Majesty, and has been strongly contended for at the Bar.

The matter rests wholly upon the French authorities, and it appears to their Lordships that the passage cited from Pothier is conclusive of the question unless it can be contradicted or explained away. It is not conceivable that the advisers of Louis XIV. should, if an unlimited priority existed, address

themselves to the exact definition by edict of a limited priority, or that Pothier should comment on that edict, all without any reference to the more sweeping rule. But so far from being contradicted or explained away, the passage in question is supported and emphasized by later authorities. There is the case reported by Sirey shewing one limit of the King's priority; viz. that his right against "comptables" did not extend even to purveyors who might have been paid in advance. There are the authorities cited in the note to that case, who all draw the distinction between the one kind of Crown debtor and the other. There is the authority of the Nouveau Denisart, expressly drawing the distinction between the official debts of the "comptable" and his private debts due to the King, and the case of the Sieur Bouvelais which illustrates that distinction.

If the priority contended for existed in the French law, there could be no difficulty in producing authority to that effect. English text-books and reports abound with assertions of the King's prerogative as we know it. But absolutely no authority was produced in the colony in opposition to the decision of Mr. Justice Mathieu, and now nothing is produced except the work of a counsellor of state writing in the year 1632.

Taking the French law to be as laid down by the whole of the judges below, the next question is, what is the proper construction of art. 1994 of the Civil Code? And the only difficulty in it when considered alone arises from the use of the expressions "ses comptables" and "persons accountable for its moneys." Here again we have complete accord among the judges in the colony, that the expressions indicate not all the debtors of the Crown, but a limited class of such debtors, known to French lawyers under the name of "Comptables." The strongest expression o opinion to that effect is uttered by the judges who decided in favour of the Crown. That opinion however is earnestly combated in this appeal.

That the word "Comptables" is a technical term of French law, denoting officers who receive and are accountable for the King's revenues, has been abundantly shewn from the Law Treatises cited at the Bar. It has not been shewn that in legal documents the word is ever used in the general sense of "debtor"

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or "person responsible." It stands in the Code as it is likely a term of art would stand, as a noun substantive, which explains itself to lawyers by itself, and does not require the addition of any explanatory words, such as in the English version are found necessary because there is no corresponding English substantive. The draftsmen of the Code were working on the existing basis of French law. They were in the main mapping out a system of French law. It would be a marvellous thing indeed if persons so engaged were to use a technical term with a definite meaning well-known to French lawyers, and precisely adapted to the position it occupies in the Code, and yet should intend to use it in some other sense, which is not its technical sense, for which it is not shewn to be ever used, and for which other words are used.

Even the general dictionaries, five or six of which their Lordships have consulted, do not lend any countenance to the respondent's argument.

The Académie first speaks of the word as a noun adjective thus:—"Qui est assujetti à rendre compte; officier; agent comptable; les receveurs sont comptables. Je ne veux point de place d'emploi comptable," which Tarver translates, "I don't want a place where accounts are kept."

As a substantive it is said to be thus used:—"Les comptables sont sujets à être recherchés. C'est un bon comptable," i.e., a good accountant.

Laveaux says very much the same as the Académie. Both shew that the word is used metaphorically, as "Nous sommes comptables de nos talens."

Littré defines the adjective thus:—"Qui a des comptes à tenir et à rendre, officier, agent comptable;" and he gives the metaphorical use. Of the substantive he says, "Celui qui est tenu de rendre compte de deniers et de son emploi."

Bouillet, in his "Dictionary of Commerce," says of the word as a substantive, "Le mot s'applique à toute personne qui est assujettie à rendre compte des affaires qu'elle a gérée."

Contanseau and Spiers render it in English, "An accountant. A responsible agent."

Their Lordships have not found any trace of its being used in

the general sense of a debtor or person under liability except in metaphor.

Tarver and Spiers render "debtor" simply by the word "débiteur."

Coming down to its special use in the instrument now being construed, their Lordships have found many passages in the Civil Code where the words "comptable" and "compte" are used strictly of those who are bound to account for particular transactions:—

As of a tutor, art. 308 et seq.
of an héritier bénéficiaire, art. 677.
of an executor, art. 913 et seq.
of a husband for his wife's goods, art. 1425.
of an agent, art. 1713.
of partners, art. 1898.

They have not been referred to and they have not found any passage in the Civil Code where these words are used to denote generally a debtor or person under liability.

For creditors and debtors the words used are "créanciers" and "débiteurs," see tit. III. throughout, and particularly cap. 7.

To express general liability the Code uses such verbs as "Tenir," "Répondre," "Charger," and their inflexions or derivatives.

If there be any difference between the French and English versions, their Lordships think that in a matter which is evidently one of French law, the French version using a French technical term should be the leading one. There might be cases in which such a question would arise. But it does not arise here. The expression "persons accountable for its moneys" is not calculated to convey to the mind of an English lawyer the notion of an ordinary debtor or of a banker. As between a banker and his customers, he, by English law, is an ordinary debtor, and the amount which he owes them is not "their" money, nor is he "accountable" for it in any but a popular sense. Arts. 1778 and 1779 of the Civil Code seem to be founded on the same view. Mr. Justice Ramsay says that to call a debtor accountable to his creditor would be a perversion of language. Their Lordships, without going so far, cannot see why, if the draftsmen of the

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English version intended to speak of debtors, they should not have used the common term for the purpose. Or rather they would have used no term at all, but would simply have mentioned the claims of the Crown, as they have mentioned the claims of the vendor and the lessor. In fact the terms used are strong evidence that in this passage the English version is really a translation from the French, and that in translating a French technical term for which there is no English equivalent, the draftsmen have used the best periphrasis they could think of. Their words are quite applicable to a "Comptable," i.e., an officer collecting revenue, bound to earmark the funds, to account for them, and not to use them as his own. Such is the position of an officer under Act 31 & 32 Vict. c. 3, s. 18, as set out in the record. They may possibly include some other cases, but they are not applicable to a bank receiving money on deposit or current account.

Construing the words according to the technical sense of "Comptables," we come to the last question; which is the construction of art. 611 of the Procedure Code.

In this article, the word "defendant" is used with strict accuracy in reference to the subject-matter of the title under which it is found, but must receive a reasonable latitude of construction in applying the article to cases where there is no defendant. And it would seem that the words "in the absence of" would require to be read in the meaning of "subject to"; for it can hardly have been meant that the rule was not to apply in any case where there were some special privileges to be answered. When construed in all other respects literally the article certainly gives to the Crown the priority claimed for it in this suit. But then it comes into conflict with Art. 1994 of the Civil Code.

In the first place, by giving to the Crown a priority for all its claims, it swamps the limited priority given by the 10th head of art. 1994, and renders that head unmeaning. But beyond this there is actual inconsistency between the two articles. According to the literal construction of 611, the Crown has priority over funeral expenses and other classes of debts which by 1994 have priority over the Crown.

It would seem that the majority of the Queen's Bench paid no

attention to this conflict. They say they are asked to "set aside" 611 on the ground that it got into the Code in some wrongful way. They were asked to do so, and were quite right in their refusal. But they were also asked to construe the Codes as they stand, and as Mr. Justice Mathieu had done. They do not notice the conflict of 611 with 1994 or the necessity of modifying the construction of one or the other. But the duty of the judge is, if possible, to reconcile the two, and for that purpose to look at all relevant circumstances.

The appellants at the Bar have pressed somewhat too absolutely the argument that a Procedure Code is not intended to enact substantive law, and that this part of the Procedure Code is only intended to give directions to the Courts how to carry the rules of the Civil Code into effect. Some of the articles of the Procedure Code (e.g., art. 610) do create or establish rights not touched by the Civil Code. The two Codes should be construed together in this part just as if the articles of the Procedure Code followed the corresponding articles of the Civil Code.

So reading them, we find that the main purpose of this part of the Procedure Code is to carry into detail the principles laid down in the Civil Code, which are repeated in the form of directions how money is to be distributed. And where fresh classes of priorities are established, they are subordinate classes not interfering with the larger classification of the Civil Code. Of course it could be no part of the Procedure Code to contravene the principles of the Civil Code, and it is clear from art. 605 that the two were believed to be working in harmony. And when the Procedure Code is found to overlap the Civil Code, and so it becomes necessary to modify the one or the other, the fact that the function of the Procedure Code is in this part of it a subordinate one favours the conclusion that it is the one to be modified.

That there should have been any deliberate intention of giving a large extension of privilege to the Crown by the indirect method of inserting a provision in a group of clauses relating to a judicial distribution of property taken in execution, is a thing highly improbable in itself. And the improbability is much heightened by the fact that at the same instant the legislature

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was engaged in cutting down throughout Upper Canada the very same privilege which it is held to have been setting up throughout Lower Canada.

The foregoing are their Lordships' reasons for concluding that full effect should be given to art. 1994, and that art. 611 should consequently be modified so as to be read in harmony with the other. There is difficulty about it, as there always is in these cases of inconsistency. Following the rule laid down for their guidance in such cases by sect. 12 of the Civil Code, their Lordships hold that the meaning of the legislature must have been to speak to the following effect:—"Subject to the special privileges provided for in the Codes, the Crown has such preference over chirographic creditors as is provided in art. 1994." Or, adhering as closely as possible to its rather inaccurate language, "In the absence of any special privilege, the Crown has a preference over unprivileged chirographic creditors for sums due to it by the defendant, being a person accountable for its money."

It may be objected that, thus read, the article is only a repetition of what is contained in the Civil Code. That is so, but it will be found that some of this group of articles (art. 607 may be taken as an example), in fixing the rank of recipients of a fund actually under distribution, do contain repetitions of the corresponding articles of the Civil Code which give the same rank in the wider and more abstract form of privileged claims or "créances." The objection therefore is not a serious one, as the repetition results from the principle on which these portions of the two Codes are framed.

This reading is nearly the same as the readings proposed by Mr. Justice Mathieu and Chief Justice Dorion. It is a large modification of the words, but not larger than is required to bring the two sections into harmony. There is ample authority for it in *Carter* v. *Molson* (1), and the other cases cited at the bar, and in that of the *Western Counties Railway Company* v. *Windsor and Annapolis Railway Company* (2).

The result is, that in the opinion of their Lordships the Court of Queen's Bench ought to have dismissed with costs the appeal from the Superior Court. They will now humbly advise Her

(1) 8 App. Cas. 530. (2) 7 App. Cas. 178.

Majesty to make such a decree. The respondents, by whom the Crown is represented, will pay the costs of the consolidated appeals.

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Solicitors for the appellants: *Simpson, Hammond, & Co.*

Solicitors for the respondent: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

JAMES WHARTON WHITE . . . . . DEFENDANT;

AND

JOHN NEAYLON . . . . . PLAINTIFF.

J. C.* 1886 *Feb.* 9.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

South Australian Registration Act, 5 Vict., No. 8, s. 3—Priorities—Registered Title affected by a prior unwritten Equity.

Held, that under Registration Act, 5 Vict., No. 8, s. 3, a prior document of a registrable nature unregistered cannot convey a good title against a subsequent document of a registrable nature registered; but there is nothing in the Act to exclude a claim upon an unwritten equity, of which the subsequent registered purchaser has notice.

APPEAL from a judgment of the full Court (July 3, 1882), affirming a judgment of the Chief Justice (Oct. 4, 1881).

The facts are stated in the judgment of their Lordships.

The respondent in this suit, which was brought on the 22nd of December, 1880, against Thomas Neaylon, and the appellant claimed that Thomas might be ordered to specifically perform an agreement alleged to have been made in 1878 between the respondent and Thomas for the transfer by Thomas to the respondent of his interest in a block of land known as Natterannie, and to transfer the said block, or the lease thereof, to the respondent. And that if the lease had been assigned to the appellant, the assignment thereof should be declared fraudulent and void. And that Thomas and the appellant should be ordered to assign

* *Present*:—LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

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the same lease to the respondent. And also claimed damages and other relief.

The appellant's defence was that the alleged agreement was a verbal one, and was, under the Statute of Frauds, void. He denied that he ever had any notice of the claim and title of the respondent to the block; and alleged that on the 1st of May, 1880, Thomas agreed to sell the block to the appellant for £500, and that on the same day Thomas duly assigned to the appellant his interest in the said block, and that such assignment was indorsed on a certificate of an application for a lease of the said block, and that the same certificate and assignment were registered in the General Registry Office for South Australia. And that by an indenture, dated the 29th of October, 1880 (indorsed on the lease of the said block), Thomas duly assigned all his interest in the premises comprised in the same lease to the appellant, and that the indenture was duly registered in the General Registry Office. And the appellant submitted that by such registration he became and was entitled to the block in priority to any claim of the respondent.

By his judgment the Chief Justice declared that the agreement in the pleadings mentioned constituted a binding agreement between the respondent and Thomas and ought to be specifically performed, and decreed the same accordingly, and declared that the agreement and assignment of the 1st of May, 1880, and the assignment of the 29th of October, 1880, in the defence of the appellant mentioned, were made with notice of the said agreement between the respondent and Thomas, and were therefore fraudulent as against the respondent. And ordered the appellant and Thomas to execute an assignment to the respondent of the indenture of lease, dated the 28th of October, 1880, in the pleadings mentioned. And ordered the appellant and Thomas to pay to the respondent £100 by way of damages and costs.

Davey, Q.C., and *J. D. Wood*, for the appellant, contended that there was no evidence from which a contract previous to 1879 could be implied and no evidence of a change of possession. Further, the alleged agreement between the respondent and Thomas ought, under the 4th section of the Statute of Frauds, to

have been in writing, and had not been taken out of the statute by the alleged acts of part performance by the respondent. The acts relied on were not unequivocally referable to the alleged agreement as putting them in a position different from that which but for the fresh agreement they would have occupied. On the contrary, they ought to be referred to the partnership agreement. See *Maddison* v. *Alderson* (1), a case which exhausts the law as to part performance: *Brennan* v. *Bolton* (2). Further than that, the appellant claimed under documents which had been duly registered under 5 Vict., No. 8; and by sect. 3 he is entitled as a purchaser for valuable consideration to priority over any title of the respondent which is founded on an unregistered agreement. The statute only applies in terms to prior written agreements, for they only are capable of registration. But the legislature meant to give the registered deed priority over valid unregistered deeds, and à fortiori over invalid agreements. The other side want not merely to be relieved of the Statute of Frauds by their part performance, but to be relieved of the Statute of Registration also, and to be in a better position than they would have been in under a written agreement. If the appellant took, with actual notice of a written contract, his deed, if registered, prevails; but the respondent's case is that if he took with constructive notice of an oral agreement his title is defeated. Reference was made to *Sumpter* v. *Cooper* (3); *Kettlewell* v. *Watson* (4); *Agra Bank* v. *Barry* (5).

Rigby, Q.C., *Dibdin*, and *Gill*, for the respondent, were not called upon.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

In this case the great mass of the facts are not disputed on appeal, because there have been concurrent judgments upon them in the two Courts below, and they are of a nature which this tribunal is exceedingly unwilling to review when there have been

(1) 8 App. Cas. 467.
(2) 2 D. & War. 349.
(3) 2 B. & Ad. 223.
(4) 26 Ch. D. 501.
(5) Law Rep. 7 H. L. 148-157.

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such concurrent judgments. Mr. Davey has taken proper notice of that rule, and has abstained from disputing the facts.

The material facts are these. John and Thomas Neaylon carried on business in partnership. Their business was to get grants of land from the Crown, and then to sell the land to advantage. It was not a business for working the land, but for buying and selling it. They determined to apply for a grant of the property in dispute, which is called Natterannie, and the application was made by an agent named Wadham, in the name of Thomas Neaylon. The surveyor's certificate of a right to the grant was given to Thomas Neaylon. The actual grant or lease in pursuance of the certificate was made to Thomas Neaylon. The certificate and the lease were both registered in the name of Thomas, so that he became the registered owner of the property. Being such registered owner, he sold and transferred to the appellant, White. That transfer was registered, so that White became the registered owner. But White, before he contracted to buy the property, had express and full notice of the claims of John. Those claims were not his right as a partner, but a separate right to Natterannie in consequence of disputes which took place between the partners, and were settled by an agreement that John should take Naterannie in lieu of his other claims. Further, it is admitted, or not disputed, that John took possession of Natterannie, and that he executed certain works upon the land.

The question then being whether the subsequent registered title of the appellant, or the prior unregistered and equitable title of John, should prevail, two objections are taken by the appellant to John's title. The first objection is grounded on the Statute of Frauds, and it is admitted that there is no written contract to satisfy the Statute of Frauds. John makes answer that the work done by him upon the land is such a part performance of the contract as according to the law established in courts of equity will relieve his title from the defect created by the Statute of Frauds. That is the first question on this appeal. Their Lordships understand it to have been hardly argued at the bar, and if argued it certainly could not be maintained, that the works done by John would not be sufficient to take the case out of the

Statute of Frauds if they are referable to the subsequent contract between John and Thomas, which made John the owner of the land. But it has been contended with great elaboration and ingenuity that the acts are referable to John's prior title as partner with his brother and not referable to his ownership.

Let us see what the acts are. This is the evidence of John, which has been accepted by the Courts below, and must be taken to give the whole account of the case. He says:—"About the beginning of 1878 I had an arrangement with Tom about Natterannie. I was to have it in place of my share of the purchase-money of Primrose Springs. Nothing had been done to the country at that time. After that I put down wells," then he states what the wells were—so many feet deep, and so much water. "I put up a stock yard—three yards, one large and two small; a grass hut; a stone house of three rooms; a blacksmith's shop. The total expense was nearly £400. I did all this after I had taken it over from Tom. I went there to live, and used the place for horses and cattle. I have lived there up to the present time, and have men there still. Tom went on with his mail contract, and never interfered in any way with Natterannie." On cross-examination that evidence was not shaken or modified except to this extent, that Tom came to stay with John at Natterannie while the works were going on, and that he worked at the stone house.

It must be remembered that the partnership was not a partnership for working the land. It was a partnership solely for buying and selling the land, and the acts done were works upon the land. If indeed there had been nothing done but the sinking of wells, it might be doubtful to which title such work was to be referred, because the getting of water was a condition precedent to the claim of a grant from the Crown. But there is a great deal more than the sinking of wells. There is the stock-yard, the blacksmith's shop, the stone house to live in, and so forth. All those things are far beyond the partnership business, and their Lordships are of opinion, coinciding therein with the Courts below, that they must be referred not to the partnership title, but to the ownership of John.

That being so, John has an equity enforceable, notwithstanding the Statute of Frauds, against Thomas; and, as the appellant had

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full notice of all John's rights against Thomas, John has the same equity against the appellant.

Then the question is whether, notwithstanding that equity, the Registration Act excludes John from enforcing it. Now, reading that Act shortly, and taking only the material words which refer to the present case, it runs thus: "That all contracts in writing concerning any lands may, after the commencement of this Act, be registered, and every such contract shall be adjudged fraudulent and void at law and in equity against any subsequent purchaser unless registered, and that although such subsequent purchaser had notice of such prior contract before or at the time of the making of such subsequent conveyance." It is quite clear under this enactment that a prior document of a registrable nature, unregistered, cannot convey a good title against a subsequent document of a registrable nature and registered; but there is nothing in the wording of the Act to exclude a claim upon an unwritten equity of which the subsequent registered purchaser has notice. It is said that the legislature must have intended to exclude such equities, and it is said to be absurd that if John had taken a further precaution, and had got a writing from Thomas acknowledging his title or contracting to give him a title, and had omitted to register it, he could not have enforced his title, but inasmuch as he got no such writing he can. It is no doubt difficult, if we were to speculate on the matter, to suppose that such was the deliberate intention of the legislature. It may not have been so, but their Lordships have nothing whatever but the words of the Act, and for aught they can tell there may have been something which induced the legislature to leave the law in that state. They gather from the judgments in the Court below that the law has been so accepted by conveyancers for forty years, and yet nothing has been done to alter it. It may have been that the framers of this Act supposed that the whole ground was covered between the Statute of Frauds and the Statute of Registration, forgetting that a claim might be enforceable notwithstanding the Statute of Frauds. If so, there was a mistake, but it was a mistake which a court of law is powerless to remedy. Or it may have been a mere oversight, so that this is a casus omissus, and if so a court of law is equally powerless to remedy it. If

courts of law were now to assume the power of laying down a contrary rule on a guess as to the intentions of the legislature, they might be defeating those very intentions; and they might also, and probably would, shake many titles which now stand quite secure. Their Lordships can do nothing but construe the statute literally as it stands; and, construing it in that way, it does not exclude the equity acquired by John Neaylon in this case.

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The result is that their Lordships agree with the judgment of the Court below; they think that this appeal must be dismissed with costs, and they will humbly advise Her Majesty to that effect.

Solicitors for appellant: *Wilkins, Blyth, & Dutton.*

Solicitors for respondents: *Bridges, Sawtell, Heywood, Ram, & Dibdin.*

[PRIVY COUNCIL.]

KIRKPATRICK AND OTHERS . . . . . PLAINTIFFS;

AND

THE SOUTH AUSTRALIAN INSURANCE COMPANY, LIMITED . . . . . } DEFENDANT.

J. C.* 1886 *Feb.* 24.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Contract of Insurance—Receipt of Premiums—Specific Appropriation.

Where the plaintiffs being agents for an insurance office remitted to it £100 "for premiums," and it appeared that the £100 was to the knowledge of the office in excess of what they owed as agents, and that the terms on which certain lapsed policies should be renewed by the office for their benefit had been ascertained by consent:—

Held, that although there was not in the office any specific appropriation of any part of the £100 to the payment of the premiums on the lapsed policies, yet that it must be taken to have been received on account thereof, and that from the date of receipt there was a good contract for the renewal of the old insurances.

APPEAL from a judgment of the Full Court (Nov. 27, 1884), reversing a judgment of the Chief Justice (Nov. 14, 1883), and entering judgment in favour of the respondents.

* *Present:*—THE LORD CHANCELLOR (LORD HERSCHELL), LORD BLACKBURN, and LORD HOBHOUSE.

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AUSTRALIAN
INSURANCE
COMPANY.

The sole question at issue was whether on the 2nd of February, 1883, certain goods of the appellant were covered by policies of insurance against fire. The respondent contended that those policies had lapsed, the appellants that they had been renewed. The facts are stated in the judgment.

Rigby, Q.C., and *R. S. Wright*, for the appellants.

Sir *Horace Davey*, S.G., and *Cyril Dodd*, for the respondent.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The only question in this appeal is whether the £100 which was remitted by the plaintiffs on the 25th of January, 1883, and received by the insurance company on the next day is to be taken to have been in part paid and accepted by way of renewing two policies called 10 and 11, which at that time had lapsed. That question must be decided by reference to all the previous communications between the parties.

It is clear that for some time the office had been urging the plaintiffs, or giving them the very broadest hints, that the policies should be renewed, and on the 2nd of January, 1883, they telegraphed that the amount of premiums which had been mentioned in four previous telegrams should be wired,—that is, their Lordships understand, should be remitted by telegraph. On the next day the office wrote to the plaintiffs. They recapitulated all the previous applications, among which was the request that the premiums should be wired. The answer to that letter came on the 13th of January by telegram, and is to the effect that "The whole of the premiums will be wired to you Monday first,"—which is next Monday. A question has been raised whether in construing the effect of the communications between the parties the contents of that telegram should be imported, because it is said that it was not in the knowledge of either of the parties when it was sent or when it was received. Their Lordships however think that as it was undoubtedly received by the insurance company, although there may have been some carelessness on the part of their clerks, the know-

ledge of it must be ascribed to the company, and it must be taken as an integral part of the correspondence.

So taking it, what we find is that on the Monday mentioned the premiums were not remitted; but soon afterwards, on the 25th of January, £100 was sent "for premiums," and received by the defendants. At that time there was some amount owing by the plaintiffs to the defendants for premiums received by the plaintiffs in the character of agents of the defendants, but not as much as £100. The defendants at that time knew of all the amounts that were then due to them by the plaintiffs, and there is no evidence that they had any reason to believe that there were other amounts received by the plaintiffs which they had to account for as their agents. Under these circumstances their Lordships consider that, although the defendants did not make in their books any specific appropriation of any part of the £100 to the payment of the premiums on the two lapsed policies, they must be taken to have received that portion of the £100 in respect of those policies the renewal of which they had been urging from time to time. All other terms of the contract are ascertained, the money was paid, and there was from that moment a perfectly good contract for renewal of the old insurances. Their Lordships wish to add that even if the telegram of the 13th of January is to be struck out of the correspondence as not being within the knowledge of the parties, yet it is at all events very doubtful whether that could make any difference in the decision of the case.

The result is that their Lordships think that the decision below was erroneous. The Chief Justice decided in favour of the plaintiffs. The judgment of the Supreme Court should have been to dismiss the appeal with costs. Their Lordships will now advise Her Majesty to make a decree to that effect, and the respondents must pay the costs of this appeal.

Solicitors for the appellants: *Trinders & Romer.*
Solicitors for respondent: *Gamlen, Burdett, & Woodhouse.*

[PRIVY COUNCIL.]

J. C.* 1886 Feb. 23, 24.

INCE . . . . . DEFENDANT;

AND

THORBURN . . . . . PLAINTIFF.

ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME COURT FOR CHINA AND JAPAN.

China Settlements—Land and Municipal Regulations, 1854, *Art.* 5—*Construction—Rights of Renters.*

Held, that according to the true construction of Art. 5 of the Regulations of 1854, (1.) the public uses to which beach grounds of the rivers are thereby dedicated are the uses to which such grounds in the district are ordinarily held subject; (2.) that such dedication does not deprive the renter of his property in the grounds, but obliges him to respect the uses; (3.) that every renter takes with the condition, express or implied, that his holding is subject to such uses; (4.) that jurisdiction is conferred to prevent anything (e.g., building thereon) being done inconsistent with or destructive to the rights of the public having uses on the beach ground.

APPEAL from a decree of the Supreme Court (Feb. 3, 1885).

The suit was commenced by the respondent, the Secretary of the Council for the Foreign Community of Shanghai, meaning thereby the Foreign Settlements of Shanghai north of the Yang King Pang, who sued on behalf of the Council.

The appellant, a British subject, was the owner, since 1858, of a certain lot of land situate within the boundaries appointed for the location of foreign renters at Shanghai aforesaid, north of the Yang King Pang Creek, and known as Lot 232 in the books for registry of land kept at the British Consulate at Shanghai.

In the year 1854 certain regulations (the 5th article of which is set out in their Lordships' judgment) entitled Land Municipal Regulations for the peace, order, and good government of all persons residing on the land set apart by the Chinese authorities for the residence of foreigners were agreed and settled upon by the representatives of England, France, and the United States of

* *Present*:—THE LORD CHANCELLOR (LORD HERSCHELL), LORD BLACKBURN, and LORD HOBHOUSE.

America, these being the three treaty powers, and under their instructions by the consuls of the above-mentioned states in communication with His Excellency Woo, the chief local authority representing the Chinese Government at Shanghai.

The appellant banded or embanked and filled up a portion of his Lot 232, and by storing earth, piles, and other materials thereon obstructed the coming of boats and other vessels to the shore and the passage of persons to the water and the exercise of other rights claimed thereon, and expended Tls.2892 in so doing. In May, 1883, he wrote to the respondent that it was his intention to utilize the said portion, i.e., build on or lease the same for building purposes.

On the 11th of July, 1883, the respondent sued, praying for an injunction to restrain the appellant from building on the said portion of Lot 232 without first obtaining the consent of the proper majority of land renters and others entitled to vote in public meeting assembled as aforesaid.

The appellant denied that the said portion of Lot 232 was, when it was acquired in the year 1858, beach ground within the meaning and provisions of the said Land Regulations of 1854, and he also denied that the said Land Regulations were valid, or of any force or effect in law, or that they in any way bound or affected either the appellant or his property.

The suit was tried before the Chief Justice at Shanghai, on the 19th of January, 1885, who, on the 3rd of February, 1885, ordered that on the Council repaying to the appellant the said sum of Tls.2892 expended by him as aforesaid, with interest thereon at 8 per cent., the injunction prayed should issue against the appellant.

Myburgh, Q.C., and *Latham*, for the appellant, contended that the Regulations of 1854 were not valid, though they had been upheld by the Supreme Court in *Keswick* v. *Wills*, in 1865, and in *Municipal Council* v. *Gibb*, in 1865. New Regulations were passed in 1869, and in October, 1881, an Order in Council was passed under the Foreign Jurisdiction Act (6 & 7 Vict. c. 94), which confirmed certain Regulations described in its schedule, but did not confirm the Regulation of 1854. Reference was made

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to 6 & 7 Vict. c. 80, and c. 94, and an Order in Council of the 13th of June, 1853. Then came the Regulations of 1854, passed by the land renters at a meeting, agreed to by the foreign ministers of England, France, and Germany, and their consuls, and sealed by an officer of the Chinese Government. They were not approved or enacted by the Chief Superintendent, Sir John Bowring. The jurisdiction of the Crown being personal and not territorial, its regulations could only extend to British subjects and to such provisions as were necessary under the order for securing the observance of treaties, peace, order, and good government. The regulations, and especially art. 5, were ultrà vires. Moreover the land in question was not beach ground within their meaning. Further, according to the true interpretation of art. 5, the appellant's rights to the land in question were absolute until a surrender was made by himself. It had been surrendered to public uses before the Regulations, and the liability was only to surrender them on demand if they should be required for roads. Moreover the respondent's claim was barred by acquiescence.

Giffard, Q.C., and *Method*, for the respondent, were not called upon.

The judgment of their Lordships was delivered by

LORD BLACKBURN:—

In this case several questions have been argued with regard to which, with two exceptions, their Lordships do not feel any difficulty. It seems to be perfectly clear that the power which is conferred by the authority of the Orders in Council which have been mentioned enabled Sir John Bowring, then Superintendent of Trade in China, to agree to regulations such as were actually agreed to; and the first question is, whether he did really pass these regulations, and whether they are regulations for the peace, order, and good government of British subjects within this particular district of China. Upon that there has been a great deal of argument addressed to their Lordships to endeavour to shew that these regulations were not passed by Sir John Bowring as superintendent, and no doubt there was a necessity apparently that these regulations when passed by him as superintendent should be

printed and exhibited for a certain time, so that all people might know of them. As to that, their Lordships think there is no ground for disputing that in point of fact all that was necessary was done. It was said that it was not proved to have been done; but their Lordships think there is quite sufficient evidence to shew that it was, and they think that after it had been decided as long as 1865, in the case of *Keswick* v. *Wills*, that these regulations were valid, and there having been no impeachment of that decision since, they ought to advise Her Majesty that these regulations were validly made.

Then there was an attempt to say that there was no evidence that this piece of land in question was within the locality affected by the regulations, and that there was no evidence to shew that it was beach ground. As to that it seems perfectly plain, when the proceedings in 1872 about rating the land are looked at, that both parties, that is to say the Council whom the plaintiff represents and the defendant, were asserting rights against each other upon the ground that the land in question was within the locality, and that it was beach ground. These are questions of fact, and the conduct of each of the parties is evidence against him. Their Lordships, therefore, think that the Chief Justice was quite justified in coming to the conclusion that these facts were proved.

Then there come two questions, and two questions only, on which there is really considerable difficulty. The first of those questions is, what does this 5th article of the regulations of 1854 mean? There is little doubt that it is not very artificially drawn, in any point of view. It begins with the words:—"It is clearly understood and agreed to," and an attempt was made to shew that it was not an enactment, but an agreement with the foreign renters; but their Lordships think it was clearly intended to enact "That land heretofore surrendered by the various foreign renters to public use, such as roads and the beach grounds of the rivers within the aforesaid limits, shall remain henceforth dedicated to the same uses; and as new lots are acquired, such parts thereof as are beach ground shall be held under and subject to similar uses." The first question that arises upon that is, what are the public uses to which the beach ground was subject? It is

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certainly not to be found here; but their Lordships think it must be taken, and they will so advise Her Majesty, that these uses were those to which beach ground, that is the sides of the rivers, in this district is held subject, such as probably to beach boats, to have access to the river, and other things of that nature; and that the land being subject to such public uses as those, would not deprive the person in whom the beach ground was vested, by having taken a lease from the Emperor of China, of the property, but it would oblige him to respect those public uses, and consequently would prevent the exercise of many of the rights of property. If it had stopped there, there would not have been much difficulty in putting that construction upon it. Then comes what their Lordships take to be a separate enactment altogether:—"And due provision shall be made for the extension of the lines of road at present laid down, as means of communication in the settlement. To this end the committee of roads and jetties"—it is now a different committee under the new regulations—"appointed by the residents within said boundaries, will, at the beginning of each year, together examine the map and determine what new lines of roads are necessary." Then comes what their Lordships construe as a fresh enactment and regulation:—"And land subsequently required to be rented shall only be granted with the proviso expressed or understood that the renter shall surrender the beach ground aforesaid, if any, and the land required for such roads." Now there is considerable difficulty in construing those words, but the sensible meaning to be put upon them, their Lordships think, is this: that every renter who in future takes land, shall take it with the condition expressed or implied that as soon as he acquires the land it shall be subject to these public uses. They do not think it can have been meant to require that the renter should subsequently execute some deed, or some instrument to create these uses. He takes it subject to these uses ab initio from the time he gets it. Then it says: "And in no case shall land surrendered as aforesaid, either heretofore or hereafter, be resumed, or shall any act of ownership be exercised over the same by the renters thereof, notwithstanding they shall pay the Chinese Government ground rent reserved thereon." Their Lordships think that must be taken, construing

it reasonably and sensibly, as meaning no act of ownership inconsistent with the public use over the thing which has been granted to him.

Then comes a provision which is certainly very difficult indeed to construe:—"Provided always that no act of appropriation or dedication for public use of the said beach ground or ground for roads, other than those already defined, shall, contrary to the will or interests of such individual renters, in any case be sanctioned or held lawful under these regulations." If that proviso were construed to the full extent to which it is possible, the words might be said to go, that nothing without the consent of the renter shall pass the property at all, or affect the property already dedicated. The proviso would eat up the previous enactment; it would be a proviso enacting that the previous enactment should be null and void. Some construction and some sense must be given to it. Their Lordships do not say it is easy to define what that construction should be, but they think it must mean, subject to this, that the dedication to the public use of the beach grounds, to the extent to which beach grounds go, is valid and effectual to give rights to the public as far as the public have those uses over the beach ground, and consequently that there is jurisdiction as far as that goes to prevent, at the suit of the plaintiff acting for the committee, anything being done which is inconsistent with or obstructive to those rights. The question of what those rights are and to what extent those uses go upon the beach ground has not been fully entered into before the Chief Justice, who was much more familiar with them than their Lordships are, and much more competent to require such evidence as might be required, but it is assumed throughout that those rights over the beach ground which the public have were inconsistent with building upon it, and that is all that was prohibited by the injunction.

Now that being so, the only other remaining ground which their Lordships have to consider is whether or no the previous proceedings in 1880 operate so as to prevent the public committee represented by the respondent from setting up against Mr. Ince the right they now have, on the ground that at that time, when there was a suit in respect of a trespass committed, and which ended in a consent decree, this matter became res

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judicata, or that for some other reason the respondent is precluded from setting up this claim. The fact that they did act in that way, and that an action was brought, is evidence against the parties; but it is not by any means evidence which is to outweigh the rest of the evidence shewing that this is beach ground. The question whether or not it would estop the parties and bind them, seems to depend greatly upon this, whether, when we look at the proceedings and the way in which they arose, and the judgment which went by consent, there is an adjudication between these parties on a right to the ownership of the land subject to the regulations. There was no adjudication then as to the public uses. That was not a question raised in the case, and it does not seem to their Lordships that there was any adjudication such as would bind the parties on the question now under consideration, namely, as to whether there was beach ground, and whether the public had uses over the beach ground inconsistent with allowing the appellant to build upon it.

That disposes of all the points which have been raised, and for these reasons their Lordships will humbly advise Her Majesty that the judgment below should be affirmed, and the appeal dismissed with costs.

Solicitors for appellant: *Harwood & Stephenson.*
Solicitors for respondent: *Johnson & Master.*

[PRIVY COUNCIL.]

DAVIS & SONS . . . . . DEFENDANTS;

AND

SHEPSTONE . . . . . PLAINTIFF.

J. C.* 1886 *Feb.* 19; *March* 5.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Libel—Damages—Privilege.

In an action to recover damages for libel it appeared that the appellants had in their newspaper falsely charged the respondent, a public officer, with specific acts of misconduct in the execution of the duties of his office, had vouched the truth of those charges, and, on the assumption of their truth, commented on his proceedings in highly offensive and injurious language:—

Held, that they were liable. The privilege which covers fair and accurate reports of proceedings in parliament and in courts of justice does not extend to fair and accurate reports of statements made to the editors of newspapers.

APPEAL from a judgment of the Supreme Court (Nov. 22, 1883) refusing an application by the appellants for an order to set aside the verdict of a jury, and to grant a new trial.

The facts are stated in the judgment of their Lordships.

Matthews, Q.C., and *Cock*, for the appellants, contended that there was misdirection, in that the judge wrongly left to the jury to determine whether the reports in the *Natal Witness* were privileged. He led them to suppose that there could be no privilege unless the matters stated were true. He ought to have directed them that the occasion was privileged, and that there was no evidence of express malice. There was no evidence that the reports contained in the newspaper were other than a fair and accurate account of statements made by the native messengers, which the appellants bonâ fide believed and published. Reference was made to *Henwood* v. *Harrison* (1), and the cases there

* *Present*:—THE LORD CHANCELLOR (LORD HERSCHELL), LORD BLACKBURN, LORD MONKSWELL, and LORD HOBHOUSE.

(1) Law Rep. 7 C. P. 606.

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cited, *Kelly* v. *Tinling* (1); *Wason* v. *Walter* (2); *Davis* v. *Duncan* (3); *Purcell* v. *Sowler* (4).

Sir *Richard Webster*, Q.C., and *Arbuthnot*, for the respondent, were not called upon.

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The judgment of their Lordships was delivered by

LORD HERSCHELL, L.C.:—

This is an appeal from a judgment of the Supreme Court of the Colony of Natal refusing a new trial in an action brought against the appellants in which the respondent obtained a verdict for 500*l.* damages.

The action was brought to recover damages for alleged libels published by the appellants in the *Natal Witness* newspaper in the months of March and May, 1883.

The respondent was, in December 1882, appointed Resident Commissioner in Zululand, and proceeded in the discharge of his duties to the Zulu reserve territory. In the month of March, 1883, the appellants published in an issue of their newspaper serious allegations with reference to the conduct of the respondent whilst in the execution of his office in the reserve territory. They stated that he had not only himself violently assaulted a Zulu chief, but had set on his native policemen to assault others. Upon the assumption that these statements were true, they commented upon his conduct in terms of great severity, observing, "We have always regarded Mr. Shepstone as a most unfit man to send to Zululand, if for no other reason than this, that the Zulus entertain towards him neither respect nor confidence. To these disqualifications he has now, if our information is correct, added another which is far more damnatory. Such an act as he has now been guilty of cannot be passed over, if any kind of friendly relations are to be maintained between the colony and Zululand. There are difficulties enough in that direction without need for them to be increased by the headstrong and almost insane imprudence and want of self-respect of the official who unworthily represents the government of the Queen."

In the same issue, under the heading "Zululand," there

(1) Law Rep. 1 Q. B. 699.
(2) Law Rep. 4 Q. B. 96.
(3) Law Rep. 9 C. P. 396.
(4) 2 C. P. D. 215.

appeared a statement that four messengers had come from Natal to Zululand, from whom details had been obtained of the respondent's treatment of certain chiefs of the reserved territory who had visited Cetewayo, and, what purported to be the account derived from these messengers of the assault and abusive language of which the respondent had been guilty, was given in detail.

On the 16th of May, 1883, the appellants published a further article, relating to the respondent, which commenced as follows:—"Some time ago we stated in these columns that Mr. John Shepstone, whilst in Zululand, had committed a most unprovoked and altogether incomprehensible assault upon certain Zulu chiefs. At the time the statement was made a good deal of doubt was thrown upon the truth of the story. We are now in a position to make public full details of the affair, which the closest investigation will prove to be correct. A representative of this journal, learning that a deputation had come to Natal to complain of the attack, met five of the number, and in the presence of the competent interpreters took down the stories of each man."

The article then gave at length the statements so taken down, which disclosed, if, true, the grossest misconduct on the part of the respondent. It was in respect of these publications of the appellants that the action was brought by the respondent.

The appellants by their defence averred that the conduct of the plaintiff as British Resident Commissioner was a matter of general public interest affecting the territory of Natal, and that the alleged libels constituted a fair and accurate report of the information brought to the Governor of Natal and published in the colony by messengers from Zululand and its King as to the conduct of the plaintiff in the discharge of the duties of his office, and a fair and impartial comment upon the conduct of the plaintiff in his public capacity published bonâ fide and without malice.

The case came on for trial before Mr. Justice Wragg and a jury on the 4th of September, 1883, when it was proved that the allegations of misconduct made against Mr. Shepstone were absolutely without foundation, and no attempt was made to support them by evidence. It appeared that the messengers from whom the statements contained in the issue in March were derived had come from Zululand to see the Bishop of Natal, and that their

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statements had been conveyed to the editor of a newspaper by a letter from the bishop. The statements contained in the issue of May were communicated by a Mr. Watson, who was connected with the staff of the newspaper, and who had sought and obtained an interview with certain Zulus when on their way to convey a message from the King to the Governor of Natal.

At the close of the evidence the learned judge summed up the case to the jury, who returned a verdict for the plaintiff, the present respondent, for 500*l.*

Application was afterwards made to the Supreme Court to grant a new trial, but this application was refused, and the present appeal was then brought. The appellants rested their appeal upon two grounds, first, that the learned judge misdirected the jury in leaving to them the question of privilege and in not telling them that the occasion was a privileged one. The second ground insisted upon was that the damages were excessive. Their Lordships are of opinion that the contention that the learned judge ought to have told the jury that the occasion was a privileged one, and that the plaintiff could only succeed on proof of express malice, is not well founded.

There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press, but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been committed, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct.

In the present case the appellants, in the passages which were complained of as libellous, charged the respondent, as now appears without foundation, with having been guilty of specific acts of misconduct, and then proceeded on the assumption that the charges were true, to comment upon his proceedings in language in the highest degree offensive and injurious; not only so, but they themselves vouched for the statements by asserting that though some doubt had been thrown upon the truth of the story, the closest investigation would prove it to be correct. In their Lordships' opinion there is no warrant for the doctrine

that defamatory matter thus published is regarded by the law as the subject of any privilege.

It was insisted by the counsel for the appellants that the publications were privileged, as being a fair and accurate report of the statements made by certain messengers from King Cetewayo upon a subject of public importance. It has, indeed, been held that fair and accurate reports of proceedings in Parliament and in Courts of Justice are privileged, even though they contain defamatory matter affecting the character of individuals.

But in the case of *Purcell* v. *Sowler* (1), the Court of Appeal expressly refused to extend the privilege even to the report of a meeting of poor law guardians, at which accusations of misconduct were made against their medical officer. And in their Lordships' opinion it is clear that it cannot be extended to a report of statements made to the Bishop of Natal, and by him transmitted to the appellants, or to statements made to a reporter in the employ of the appellants, who for the purposes of the newspaper, sought an interview with messengers on their way to lay a complaint before the governor.

The language used by the learned judge in summing up the present case to the jury is open to some criticism, and does not contain so clear and complete an exposition of the law as might be desired. But in their Lordships' opinion, so far as it erred, it erred in being too favourable to the appellants, and it is not open to any complaint on their part.

The only question that remains is as to the amount of damages. The assessment of these is peculiarly the province of the jury in an action of libel. The damages in such an action are not limited to the amount of pecuniary loss which the plaintiff is able to prove. And their Lordships see no reason for saying that the damages awarded were excessive or for interfering with the finding of the jury in this respect.

They will, therefore, humbly advise Her Majesty that the judgment appealed against should be affirmed and the appeal dismissed with costs.

Solicitors for appellants: *West, King, Adams, & Co.*
Solicitors for respondent: *Freshfield & Williams.*

(1) 2 C. P. D. 215.

[PRIVY COUNCIL.]

J. C.*
1886
Feb. 5.

BANK OF NEW SOUTH WALES . . . DEFENDANT;

AND

JOHN CAMPBELL . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Bank incorporating Acts—Construction—Foreclosure.

Held, that there was nothing in its incorporating Acts which took away from the appellant bank the power of foreclosing, the mortgage in suit having been legally and properly taken by the bank, and in terms involving foreclosure.

The statutory provision that the bank should hold any security which it had taken "for the purpose of reimbursement only and not for profit," could not take away the power to foreclose expressly attached by statute to the mortgage.

APPEAL from a decree of the Supreme Court (Dec. 18, 1884), reversing a decree of the primary Judge (Sept. 4, 1883), and permitting the respondent to redeem the property comprised in two mortgages in respect of which the appellant had obtained an order of foreclosure under the Real Property Act of the Colony (26 Vict. No. 9).

The question in the appeal was whether the respondent was so entitled to redeem, and whether the Supreme Court was right in holding that the appellant was precluded from foreclosing by sect. 12 of its incorporating Act, which was passed in 1850, and modified by later Acts passed in 1852, 1854, and 1864.

Sect. 12 of the earlier Act is as follows:—

"12. And be it enacted, that it shall be lawful for the said corporation, notwithstanding any statute or law to the contrary, and notwithstanding any clause or provision herein contained, to purchase, take, hold and enjoy, to them and their successors for any estate, term of years or interest, any houses, offices, buildings, lands and other hereditaments necessary or proper for the purpose

* *Present*:—LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

of managing, conducting and carrying on the affairs, concerns and business of the said corporation, and also to take and to hold until the same can be advantageously disposed of for the purpose of reimbursement only and not for profit, any lands, houses, and other real estate, merchandise and ships, which may be so taken by the said corporation in satisfaction, liquidation, or discharge of any debt due to the corporation, or in security for any debt or liability bonâ fide incurred, or come under previously and not in anticipation or expectation of such security, but not for any other purposes; and to sell, convey, assign, assure and dispose of such houses, offices, buildings, land, hereditaments and other real estate, merchandise and ships, as occasion may require."

The provisions of the Act of 1864 and the facts of the case are sufficiently set out in the judgment of their Lordships.

Davey, Q.C., and *Stirling*, for the appellant, contended that the foreclosure order vested the mortgaged property absolutely in the bank, and that such order made under the Real Property Act could not be reopened. No case was made entitling the respondent to open the order even if it were possible so to do. The bank had not violated any of the provisions of its incorporating Acts; if it had the respondent was not entitled to enforce those provisions as against the appellant. Reference was made to *National Bank of Australasia* v. *Cherry* (1).

Macnaghten, Q.C., and *E. W. Byrne*, for the respondent, contended that by their Act of incorporation the bank was entitled to hold land for reimbursement only and not for profit. Consequently lands mortgaged to it are redeemable by the mortgagor at any time so long as they remain vested in the bank, notwithstanding any order of foreclosure obtained by it. The powers of the corporation as to land are strictly limited by their Acts. Reference was made to the Charitable Funds Act (33 & 34 Vict. c. 34), and to *Locking* v. *Parker* (2); *Ashbury Railway Carriage and Iron Co.* v. *Riche* (3). It was just and equitable that this order of foreclosure should be opened, and there was nothing in sect. 114 of the Real Property Act (26 Vict. No. 9) to prevent it.

(1) Law Rep. 3 P. C. 299. (2) Law Rep. 8 Ch. 30.
(3) Law Rep. 7 H. L. 653.

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BANK OF NEW SOUTH WALES v. CAMPBELL.

Davey, Q.C., replied.

The judgment of their Lordships was delivered by

LORD BLACKBURN:—

Their Lordships think that in this case it will be their duty to advise Her Majesty that the order appealed against should be reversed, and consequently it would follow that the decree of Mr. Justice Faucett should be restored. That is the advice which they will humbly give to Her Majesty, and their Lordships will now proceed to state the grounds on which they will give that advice.

It is unnecessary to inquire into a great many of the matters that have been referred to in the course of the argument. It is admitted by the counsel for the respondent, and their Lordships do not see that there is any ground on which it could have been disputed, that it must be taken here that this particular mortgage was validly executed within the provisions of the Acts as a security collateral to a bill of exchange, and so far good that there is no ground for impeaching it on that account.

Then we have to see what this mortgage is. Whatever other mortgages may be, this particular mortgage is a mortgage that was created under the Act of 1862, and did undoubtedly contain both a provision for redemption and also a provision for enabling the appellants to foreclose; and that foreclosure, when it had taken place, if it was good, would prevent the subsequent redemption. The question comes, therefore, to be whether there is anything shewn in the Acts which govern this bank to take away the power of foreclosure. Of course, if it was enacted by the legislature that under such mortgages as this, when held by this bank, there should be no power of foreclosure, it would follow that the power of redemption still remained. The question is, is there anything to shew that? The learned judges below seem to have treated the case exactly as if the transaction had happened before the Act of 1864 was passed at all, and as if that Act had not been in existence. How that happened has not been explained. Everything seems to shew that that Act was in existence, and that Act their Lordships think is the important one. Having recited that the powers of the bank given in the previous Act had

been unduly limited, and so forth, the Act of 1864 proceeds to abolish altogether sect. 3 of the former Act, and then it enacts that it shall be lawful for the corporation to make loans of money on cash credit accounts and so on, describing generally everything that a bank would do dealing as a banking company, and adds—"but that it shall not be lawful for the said corporation to advance or lend any money upon the security of lands or houses or ships, nor to own ships." Then there is a provision about shares; and then comes what is put in the form of a proviso, but which seems rather to be an enactment: "Provided always that nothing herein, or in the said recited Act contained, shall invalidate any lien acquired or to be acquired by the deposit of deeds or any mortgage of lands or other property taken or to be taken by the said corporation or any person or persons on their behalf as security collateral to any bill, promissory note, bond, or other security, or any right, claim, or title to lands or other property thence to arise." It is not necessary to refer to the provision as to the shares which follow. It certainly does seem to their Lordships that it is not possible to say that the right to foreclose which is contained in this mortgage is there taken away. The mortgage at all events is good. Then what is there in the words that follow? It goes on afterwards as part still of the same proviso—it is not at all good draughtmanship—to say that there is nothing to prevent them "from taking, holding, or enjoying to them, their successors and assigns, for any estate, term of years, or interest for the purpose of reimbursement only and not for profit, any lands, houses, or other hereditaments, or any merchandise or ships . . . . which may be taken by the company in satisfaction, liquidation, or discharge of, or in security for any debt due, or to become due to the company." No doubt these are awkwardly worded phrases, and it does not appear as if the legislature which passed them had any definite idea of what they were meaning to say; but is it possible to say that by the words they should hold it "for the purpose of reimbursement only, and not for profit," when they were taking security for any debt due or to become due to the company, it was meant that the power to foreclose (which is expressly attached by statute to the mortgage) was in itself taken away, and that it was in fact enacted

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here that when a mortgage is held by this particular company there shall be no longer a power to foreclose? It certainly does not seem to their Lordships that there is anything in these words that could possibly have that effect. Whilst the former Act, sect. 12, stood alone and without anything affecting it, there might have been something to be argued in favour of that proposition—and it is not to be understood that their Lordships are expressing any opinion on what it might have been if the former Act had stood unaltered,—but as it is, their Lordships think the question really comes round to this: that under the Act of 1864 this mortgage, which involved foreclosure, was legally and properly taken by the bank, and that there is nothing whatever to enact that the power of foreclosing should be taken away. The result is that their Lordships think the original decision of Mr. Justice Faucett was right, and that the appeal from it should have been dismissed with costs. They will therefore humbly advise Her Majesty now to make a decree to that effect. The respondents must pay the costs of this appeal.

Solicitors for the appellant: *Waltons, Bubb, & Johnson.*
Solicitor for the respondent: *G. P. Slade.*

Referred to. CHENARD v. ARISSOL. [1949] A. C. 127

[PRIVY COUNCIL.]

BARTON . . . . . DEFENDANT;

AND

TAYLOR . . . . . PLAINTIFF.

J. C.*
1886
Feb. 20;
March 6.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales, Legislative Assembly of—Power of Suspension—Action of Trespass—Pleas and Justification.

The respondent having entered the chamber of the New South Wales Assembly, of which he was a member, within a week after it had passed a resolution that he be "suspended from the service of the House," he was removed therefrom and prevented from re-entering it:—

Held, in an action of trespass, that the resolution must not be construed as operating beyond the sitting during which the resolution was passed.

Held, further, that the standing order of the Legislative Assembly adopting so far as is applicable to its proceedings the rules, forms, and usages in force in the British House of Commons, and assented to by the Governor, was valid, but must be construed to relate only to such rules, forms, and usages as were in existence at the date of the order.

The powers incident to or inherent in a Colonial Legislative Assembly are "such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute," and do not extend to justify punitive action, or unconditional suspension of a member during the pleasure of the Assembly.

Doyle v. *Falconer* (Law Rep. 1 P. C. 328) approved.

APPEAL from a decree of the Supreme Court (Dec. 9, 1884), ordering judgment to be entered for the respondent on his demurrers to the pleas pleaded by the appellant in an action of trespass to his person brought by the respondent, who at the date thereof was a member of the Legislative Assembly of New South Wales, against the appellant, who was then the Speaker.

On the 23rd of April, 1884, while the Assembly was sitting in a committee of the whole House, it passed the following resolution in consequence of the conduct of the respondent:—"That Mr. Adolphus George Taylor, having been named by the chair-

* *Present*:—EARL OF SELBORNE, LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

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man as having persistently and wilfully obstructed the business of the committee, be suspended from the service of the House." This resolution was reported by the chairman of the committee, and thereupon the Assembly passed the following resolution relating to the respondent:—"That Mr. A. G. Taylor be suspended from the service of the House." Within a period of one week after the passing of the last mentioned resolution, the respondent entered the Legislative Assembly Chamber while the Assembly was sitting for the dispatch of business and claimed the right to sit and serve as a member, whereupon the appellant, as Speaker, requested him to withdraw, and upon his refusal directed the Serjeant-at-Arms to remove him from the chamber, which was accordingly done.

The trespasses alleged in the declaration in the action were the removal of the respondent from the chamber and preventing him entering it.

The appellant pleaded three pleas to the declarations. The first plea was not guilty. The second and third pleas each set forth the above resolutions, and alleged that while the suspension still remained in force the respondent entered the chamber; that the appellant, as Speaker, requested him to withdraw, and upon his refusal directed the Serjeant-at-Arms to remove him. The difference between the second and third pleas was, that the latter set forth the standing order of the Legislative Assembly and the standing rule or standing order of the Imperial Parliament hereinafter set out, and alleged that the entry by the respondent into the chamber took place within a period of one week from the passing of the last of the two resolutions, while the second plea did not set forth either of such standing rules or orders.

The respondent demurred to the second plea on the ground that the resolution of the Legislative Assembly was no justification for the alleged trespasses, and to the third plea on the grounds that the standing order of the Legislative Assembly had not such prospective operation as to adopt the Imperial standing order, and that if it had such a prospective operation it was ultrà vires.

The appellant joined in demurrer, and the Supreme Court gave judgment for the respondent on the demurrer.

In pursuance of the power conferred on it by the Constitution Act, scheduled to 18 & 19 Vict. c. 54, s. 55, the Legislative Assembly prepared and adopted certain standing rules or orders for the orderly conduct of such Assembly, which were by such Assembly laid before the Governor, and were by him approved. The first of such standing orders is as follows, and was set out in the third plea:—

"In all cases not specially provided for hereinafter, or by sessional or other orders, resort shall be had to the rules, forms, and usages of the Imperial Parliament, which shall be followed so far as the same can be applied to the proceedings of this House."

Before and at the time when the said standing rule and order was so approved, it was one of the rules or usages of the Imperial Parliament for either House of Parliament to suspend from the service of the House for such period as it should name, or without naming any period of suspension, until it should give directions in the matter, any member persistently and wilfully obstructing the business of the House.

After the said standing orders had been so approved by the Governor, but before the obstruction of business for which the respondent was suspended from the service of the House, a rule of the Imperial Parliament was made, and was a usage in force at the time of the alleged trespass hereinafter mentioned, which rule, also set out in the third plea, is as follows:—

"That whenever any member shall have been named by the Speaker, or by the chairman of a committee of the whole House, immediately after the commission of the offence of disregarding the authority of the chair, or of abusing the rules of the House by persistently and wilfully obstructing the business of the House or otherwise, then if the offence has been committed by such member in the House the Speaker shall forthwith put the questions on a motion being made, no amendment, adjournment, or debate being allowed, 'That such member be suspended from the service of the House,' and if the offence has been committed in a committee of the whole House, the chairman shall, on a motion being made, put the same question in a similar way, and if the motion is carried, shall forthwith suspend the proceedings of the committee

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and report the circumstances to the House, and the Speaker shall thereupon put the same question without amendment, adjournment or debate, as if the offence had been committed in the House itself. If any member be suspended under this order his suspension on the first occasion shall continue for one week, on the second occasion for a fortnight, and on the third or any subsequent occasion for a month: Provided always that suspension from the service of the House shall not exempt the member so suspended from serving on any committee for the consideration of a private bill to which he may have been appointed before his suspension: Provided also that not more than one member shall be named at the same time, unless several members present together have jointly disregarded the authority of the chair: Provided always that nothing in this resolution shall be taken to deprive the House of the power of proceeding against any member according to ancient usages."

Sir *H. Davey*, S.G., and *J. D. Wood* (*Rigby*, Q.C., with them), for the appellant, contended that under the resolution there was a suspension of the respondent from the service of the House during pleasure. That depends in the first instance upon whether, according to the true construction of the standing orders of the Assembly, the rules, forms, and usages of the British House of Commons for the time being were adopted, or only those in force at the date of the standing order being passed. The intention of the legislature, having confidence in the House of Commons, was to adopt prospectively whatever rules it might prescribe. [LORD BLACKBURN referred to the Newfoundland case, *Kielley* v. *Carson* (1)]. The limitation here was, "so far as the same can be applied," i.e. so far as it was reasonable to apply them: see *Whicker* v. *Hume* (2), where the same words in 9 Geo. 4, c. 83, s. 24, are construed. In *Dill* v. *Murphy* (3) a similar restriction to that now sought to be implied, that is the restriction as to rules existing at the date of the order, was expressed; and ought if such had been the intention to have been expressed here. And at the date of the standing order it was a rule and usage of the Imperial Parliament that either House might suspend for such period as it

(1) 4 Moo. P. C. 63. (2) 14 Beav. 527.
(3) 1 Moo. N. S. 487.

deemed proper any member who persistently and wilfully obstructed its proceedings. That was a rule which could be applied by the Assembly. Here no time was fixed, but it must be construed to be during pleasure. There is a wide difference between a power to imprison and a power to exclude or suspend. According to the usage of the British House of Commons at the date of the standing order there was a power to suspend: see May's Parliamentary Practice (8th ed. p. 61), referring to 9th Commons' Journal, p. 120. [LORD SELBORNE:—Assuming a power to suspend; here there was no limit assigned.] It was a temporary exclusion. There is a power inherent in the Assembly to suspend a member for proper cause without naming a period at which the suspension is to terminate. [LORD BLACKBURN:—Even a public meeting would have power to exclude a member disturbing its proceedings; but it is very doubtful whether this Assembly could exclude from its future meetings.] *Doyle* v. *Falconer* (1). [LORD BLACKBURN:—The proceedings here look more like a punishment than a matter of self-defence.] *Bradlaugh* v. *Gossett* (2); *Howard* v. *Gossett* (3). It cannot be said that suspension for a longer period than the sitting is unreasonable.

The respondent in person was directed by their Lordships to confine his argument to the second plea. He contended that exclusion could not be beyond a time reasonable for the exercise of the power. Here, according to the appellant's argument, it might have lasted two or three years. The Assembly should have regard in all cases at least to the probable duration of the circumstances which gave rise to its order. Any order which it makes should be submitted for the approval of the Governor.

Sir *H. Davey*, S.G., replied.

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March 6.

The judgment of their Lordships was delivered by

THE EARL OF SELBORNE:—

This appeal comes before their Lordships in such a way (on demurrer to pleadings) as to cause them some embarrassment. It

(1) Law Rep. 1 P. C. 328. (2) 12 Q. B. D. 271.
(3) 10 Q. B. 359.

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is evident, when the second and third pleas are both looked at together, that by passing the resolution of suspension against the respondent, the Legislative Assembly of New South Wales meant to act upon the standing order of the British House of Commons which is set forth in the third plea, and is therein described as "a rule of the Imperial Parliament;" and which was assumed to be applicable, under its own standing orders, to the New South Wales Assembly. If that assumption had been correct, the suspension would have been good in law for the definite period of a single week. Their Lordships, however, are of opinion that the standing order of the British House of Commons set forth in the third plea was not, in April, 1884, by adoption or otherwise, a rule of procedure applicable to the Legislative Assembly of New South Wales. Assuming (but not deciding) that under the 35th section of the Constitution Act it might have been competent to the Legislative Assembly and Governor to prepare and adopt a standing rule or order, declaring that all rules and orders of the British House of Commons, whether then in existence or to be at any time afterwards made, for the orderly conduct of its business, should be adopted and followed by the Legislative Assembly, their Lordships are of opinion that the standing order set forth in the third plea cannot properly be so construed. The words "resort shall be had to the rules, forms, and usages of the Imperial Parliament" (taking the expression "Imperial Parliament" to be distributive, and to refer, when the proceeding is one of the Legislative Assembly, to the British House of Commons) naturally signify the then existing and known rules, forms, and usages of the House of Commons. In the absence of words of prospect or futurity, and of any context indicative of an intention so improbable as that of adopting by anticipation all future changes in the procedure or practice of the House of Commons, their Lordships think it would be unreasonable so to construe the standing order. They think, therefore, that the third plea is bad, and that the demurrer to it was rightly allowed.

In the second plea their Lordships find no averment, either of any standing order of the Legislative Assembly itself, or of any rule, form, or usage of the Imperial Parliament, authorising or justifying the trespass complained of by the plaintiff. The

intention of that plea seems to have been to justify the trespass on the ground of an inherent power in every Colonial Legislative Assembly to protect itself against obstruction, interruption, or disturbance of its proceedings by the misconduct of any of its members in the course of those proceedings. The nature, grounds, and limits of that power (which undoubtedly exists) have been several times considered at this board, especially in the case of *Kielley* v. *Carson* (1) and *Doyle* v. *Falconer* (2). It results from those authorities that no powers of that kind are incident to or inherent in a Colonial Legislative Assembly (without express grant), except "such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute" (3). Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For these purposes, protective and self-defensive powers only, and not punitive, are necessary. If the question is to be elucidated by analogy, that analogy is rather to be derived from other assemblies (not legislative), whose incidental powers of self-protection are implied by the common law (although of inferior importance and dignity to bodies constituted for purposes of public legislation), than from the British Parliament, which has its own peculiar law and custom, or from Courts of Record, which have also their special authorities and privileges, recognised by law. "If a member of a Colonial House of Assembly is guilty of disorderly conduct in the House while sitting, he may be removed or excluded for a time, or even expelled. . . . The right to remove for self-security is one thing, the right to inflict punishment is another. . . . If the good sense and conduct of the members of Colonial Legislatures prove insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person excluded from the place of meeting, and to keep him excluded" (4).

Those words were used by Sir James Colvile, when delivering the judgment of this tribunal in *Doyle* v. *Falconer* (2), and their Lordships adopt them. It does not, however, appear to be a just

(1) 4 Moo. P. C. 63.
(2) Law Rep. 1 P. C. 328.
(3) 4 Moo. P. C. 88.
(4) Law Rep. 1 P. C. 340.

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inference from the expressions, "excluded for a time," and "to keep him excluded," that a power to exclude a member, and to keep him excluded, for a length of time unlimited, or limited only by the discretion of the assembly, was considered in *Doyle* v. *Falconer* (1), or ought, on sound principles, to be now held by their Lordships to be necessary to the existence of such a body or to the proper exercise of its functions. The principle on which the implied power is given confines it within the limits of what is required by the assumed necessity. That necessity appears to their Lordships to extend as far as the whole duration of the particular meeting or sitting of the assembly in the course of which the offence may have been committed. It seems to be reasonably necessary that some substantial interval should be interposed between the suspensory resolution and the resumption of his place in the assembly by the offender, in order to give opportunity for the subsidence of heat and passion, and for reflection on his own conduct by the person suspended; nor would anything less be generally sufficient for the vindication of the authority and dignity of the assembly. The sitting or meeting, as a whole, has a practical unity. It commences with the usual forms of opening, when the Speaker takes the chair; it is terminated by the adjournment of the House. It has its proper rota of business (such as, in our House of Commons, the notices and orders of the day); a separate record of the whole business done at each such sitting or meeting (including the suspension of a member, if that should take place) is entered upon the journals. The "service" of members in attendance at each such sitting or meeting is continuous; and at each adjournment that service is interrupted, not to be renewed until after an interval of some hours, days, or weeks, or even months, as the case may be.

The power, therefore, of suspending a member guilty of obstruction or disorderly conduct during the continuance of any current sitting, is, in their Lordships' judgment, reasonably necessary for the proper exercise of the functions of any Legislative Assembly of this kind; and it may very well be, that the same doctrine of reasonable necessity would authorize a suspension until submission or apology by the offending member; which, if

(1) Law Rep. 1 P. C. 328.

he were refractory, might cause it to be prolonged (not by the arbitrary discretion of the Assembly, but by his own wilful default) for some further time. The facts pleaded in this case do not raise the question whether that would be ultrà vires or not. If these are the limits of the inherent or implied power, reasonably deducible from the principle of general necessity, they have the advantage of drawing a simple practical line between defensive and punitive action on the part of the Assembly. A power of unconditional suspension, for an indefinite time, or for a definite time depending only on the irresponsible discretion of the Assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse. It is true that confidence may, generally, be placed in such bodies; and there may be cases (as in such very important colonies as this of New South Wales) in which there may be preponderating reasons for entrusting them with much larger powers than those which ought to be implied from the mere necessity of the case. But their Lordships are at present considering only those powers which ought to be implied on the principle of necessity, and which must be implied in favour of every Legislative Assembly of any British possession, however small, and however far removed from effective public criticism. Powers to suspend toties quoties, sitting after sitting, in case of repeated offences (and, it may be, till submission or apology), and also to expel for aggravated or persistent misconduct, appear to be sufficient to meet even the extreme case of a member whose conduct is habitually obstructive or disorderly. To argue that expulsion is the greater power, and suspension the less, and that the greater must include all degrees of the less, seems to their Lordships fallacious. The rights of constituents ought not, in a question of this kind, to be left out of sight. Those rights would be much more seriously interfered with by an unnecessarily prolonged suspension than by expulsion, after which a new election would immediately be held.

The same considerations have also led their Lordships to the conclusion that even if a power of unconditional suspension during the pleasure of the Assembly did exist, a suspensory resolution not expressed (or interpreted by any standing order) to

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be conditional on something to be done by the person suspended, or to be during pleasure, or for a definite time, ought not to be held operative beyond the end of the current sitting. The resolution pleaded in this case was, "That Mr. A. G. Taylor be suspended from the service of the House." If more was meant than to suspend him for the rest of the then current "service," their Lordships think that it ought to have been distinctly so expressed. "Suspension" must be temporary; the words, "suspended from the service of the House," may be satisfied by referring them to the attendance of the member in the House during that particular sitting. So much as this is necessary to make the suspension effective, more is not. The case is not that of the suspension of a public officer, ab officio, by a competent judicial or executive authority, having jurisdiction over the officer or over the tenure of his office, and acting in pœnam, not for self-defence only. Nor is it like that of a commitment, where the gaoler or public officer who receives a prisoner into his custody under a legal warrant is bound to detain him till he has authority for his release.

Even, therefore, if the second plea had set forth the standing order of the Legislative Assembly, adopting the rules, forms, and usages of the British House of Commons, and had contained an averment which was admitted by the demurrer to be true that, at the time when that standing order was made, the British House of Commons had and exercised the power of unconditional suspension for an indefinite or unlimited period of time, their Lordships would have agreed with the Court below, so far as to hold that the suspension pleaded in this plea was not to be construed as operative beyond the sitting during which the resolution was passed.

The second plea contains an averment that the trespass of the 23rd of April alleged in the declaration took place after the suspensory resolution had been passed, "during the same session of Parliament and while the said suspension remained in force." The argument at their Lordships' bar was conducted upon the assumption (or concession) that this ought to be understood as equivalent to a statement that the alleged trespass took place during a sitting of the Assembly subsequent to that at which the

suspensory resolution was passed; in which view the averment that the suspension remained in force is one not of fact but of law. It is, therefore, unnecessary to consider whether, in the absence of such a concession on the appellant's part, their Lordships would have been justified in so construing this averment.

Their Lordships entertain no doubt of the validity of the standing order of the Legislative Assembly, adopting, so far as applicable to its proceedings, the rules, forms, and usages which were in force in the British House of Commons at the time when that standing order was passed and assented to by the Governor of New South Wales. They think it proper to add that they cannot agree with the opinion which seems to have been expressed by the Court below, that the powers conferred upon the Legislative Assembly by the Constitution Act do not enable the Assembly "to adopt from the Imperial Parliament, or to pass by its own authority, any standing order giving itself the power to punish an obstructing member, or remove him from the chamber, for any period longer than the sitting during which the obstruction occurred." This, of course, could not be done by the Assembly alone without the assent of the Governor. But their Lordships are of opinion that it might be done with the Governor's assent; and that the express powers given by the Constitution Act are not limited by the principles of common law applicable to those inherent powers which must be implied (without express grant) from mere necessity, according to the maxim, Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest. Their Lordships' affirmance of the judgment appealed from is founded on the view, not that this could not have been done, but that it was not done, and that nothing appears on the record which can give the resolution suspending the respondent a larger operation than that which the Court below has ascribed to it.

Their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss this appeal with costs.

Solicitors for the appellant: *Mackrell, Maton, & Godlee.*
The respondent in person.

[PRIVY COUNCIL.]

J. C.* 1886 March 5; April 3.

SILAS HARDING . . . . . PLAINTIFF;

AND

THE BOARD OF LAND AND WORKS . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Victorian Lands Compensation Statute, 1869, *No.* 344, *sect.* 35—*Construction—Compensation—Set-off.*

Held, according to the true construction of the 35th section of the "Victorian Lands Compensation Statute, 1869," that in assessing under the Act compensation for land compulsorily taken for a railway, the enhancement in value of the owner's adjoining lands may be set off against the amount allowed for damage thereto arising from such compulsory taking or severance; but may not be allowed against the compensation for the land actually taken.

Such "enhancement in value" includes that which arises from the use as well as the construction of the railway.

APPEAL from an order of the Supreme Court (Nov. 28, 1883), refusing to grant a rule nisi on the ground of misdirection, and an order dated Dec. 10, 1883, discharging a rule nisi granted on the former date to enter the verdict for the appellant.

The facts of the case, and the proceedings in the Court below, sufficiently appear in the judgment of their Lordships.

The judgments given upon the argument of the rule are reported in 9 Vict. L. R., p. 448.

Sir *Richard Webster*, Q.C., *Crump*, Q.C., and *E. Hume Williams*, for the appellant.

The *Solicitor-General* (Sir *H. Davey*, Q.C.), *Hall*, Q.C., and *Gurner*, for the respondent.

1886 April 3.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

On the 17th of November, 1883, the following issue between the appellant and respondent was, under a provision in the

* *Present*:—THE LORD CHANCELLOR (LORD HERSCHELL), LORD BLACKBURN, LORD MONKSWELL, LORD HOBHOUSE, and SIR RICHARD COUCH.

"Lands Compensation Statute, 1869," of the colony of Victoria, tried in the Supreme Court of the colony before Higinbotham, J.:—

"Whereas Silas Harding affirms, and the Board of Land and Works denies, that the compensation to be paid by the said board to the said Silas Harding for the piece of land in the parish of Adzar, in the county of Villiers, in the colony of Victoria, containing fifteen acres and thirty-one perches, more or less, being, &c. . . . . the property of the said Silas Harding, taken by the said board for the construction of a line of railway from Arasat, in the said colony, to Hamilton, in the said colony, as also for the damage which has been, or may be, sustained by reason of the severing of the said land so as above taken from other lands of the said Silas Harding, and of such other lands being otherwise injuriously affected by the exercise of the powers of the Act in that case made and provided, amounts to the sum of £3676 6*s.* 6*d.*, and it has been agreed that, in the event of the jury finding in the negative of the said issue, the amount of the said compensation shall be ascertained by a verdict of a jury, and both parties pray that the same may be inquired of by the country."

In answer to questions which were put to the jury by the learned judge, they found,—

1. That the amount of compensation payable to the appellant for the price of the land taken, and the damage described in the issue, did not amount to £3676 6*s.* 6*d.*

2. That the commercial or market value of the land taken was, on the 25th of February, 1876 (the date of the notice to treat), £61 1*s.* 9*d.*

3. The amount that ought to be allowed for the alleged or real compulsory taking of the land was £15 4*s.*

4. The amount payable for the plaintiff's fence was £113.

5. The amount of damage sustained by the plaintiff in respect to other lands of his, by severance from three-chain road, was £60.

6. The amount of the enhancement in value of 1182 acres of adjoining land of the plaintiff, by reason of the making of the railway, was £591.

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Thereupon a verdict was directed to be entered for the defendants, and leave reserved to both parties to move to enter a verdict as the Court should think proper in accordance with the findings of the jury. On the 28th of November, 1883, the Supreme Court was moved on behalf of the plaintiff to grant a rule to shew cause why the verdict should not be set aside on the ground of misdirection, and also why the verdict should not be set aside, and a verdict entered for the plaintiff for £249 5*s.* 9*d.* or £189 5*s.* 9*d.*, on the grounds that there was no evidence of any enhancement in value of the adjoining land belonging to the plaintiff, or other benefit or advantage which he obtained by reason of the making of the works or undertaking, within the meaning of the 35th section of the Lands Compensation Statute, 1869, or that, if there was evidence of such enhancement in value, the amount thereof should not be taken into consideration by the jury, except in reduction of the amount of the damage sustained by the plaintiff by reason of the severing of the lands taken from his other lands. The Court refused to grant a rule to set aside the verdict on the ground of misdirection, but granted a rule to set it aside and enter a verdict for the plaintiff. This rule was discharged by the Court on the 18th of December, 1883. The present appeal is from the refusal to grant the former rule and the order discharging the latter.

The misdirection complained of, was that the judge told the jury that it was open to them to consider, as affecting the plaintiff's credit, whether he had not obtained the Devon Park estate, of which the severed allotments formed part, by illegal means, and, in connection therewith, whether he had not been guilty of employing persons to make false declarations, if not to commit perjury, and that he told the jury that it was open to them to consider the plaintiff's act in illegally closing roads in the Devon Park estate as affecting his evidence in regard to the value of the allotments. The charge to the jury is stated in the record of proceedings, and their Lordships are of opinion that there was no misdirection.

The important question is whether the enhancement in value of the adjoining land is to be considered in reduction of the whole compensation to be paid by the respondents, including

both the value of the land taken and the damage by reason of severance from other lands, or of the compensation for the latter only. There was evidence to support the finding of the jury as to the enhancement in value, and, subject to the second question afterwards noticed, that finding will stand. Therefore, if the former part of the first question is answered in the affirmative, the verdict for the defendants will stand; if the latter part is so answered the verdict should be entered for the plaintiff for £185 5*s.* 9*d.*, the £60 damage for severance being deducted from £249 5*s.* 9*d.*, the total of the value of the land and damage.

The 35th section of the Lands Compensation Statute, 1869, is as follows:—

"In estimating the purchase-money or compensation to be paid by the board in any case, regard shall be had by the magistrates, surveyors, valuators, or jury, as the case may be, not only to the value of the land to be purchased or taken by the board, but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, and they shall assess the same accordingly to what they shall find to have been the value of such lands, estate, or interest, at the time notice was given of such lands being required for the works or the undertaking, and the said magistrates, arbitrators, surveyors, valuators, and jury, in assessing such compensation, are authorized and empowered, and shall take into consideration the enhancement in value of the adjoining land belonging to the person to whom compensation is to be made, or any other benefit or advantage which such person may or shall obtain by reason of the making of such works or undertaking in reduction of such compensation."

Their Lordships have had great difficulty in coming to a conclusion as to what was the intention of the legislature in the latter part of this section. They cannot agree with the Chief Justice of the Supreme Court, when he says that the policy of the last part of the section is obviously to enable the Government, in the construction of railways or other expensive works, to

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recover, by way of set-off to the compensation for lands taken or injuriously affected, a deduction for benefits resulting to the landowner from the formation of the particular work. He does not seem to have considered that there would be lands adjacent to the railway which would be enhanced in value by the making of it, but no part of which might be taken by the board. The owners of these might be equally benefited with the owners of lands taken, or even more so, and would lose nothing, whilst the latter might lose the whole value of their land that was taken. If this was the intention, it might have been clearly expressed.

The words "purchase-money," and the words "value of the land to be purchased or 'taken,'" in the first part of the section, appear to shew that the taking of the land was to be regarded as a purchase by the board, and if it was intended that the enhancement in value of the other land was to be set off against the price or value of the land taken, their Lordships think it would have been expressed by repeating the word purchase-money in the latter part of the section. In the part of the section which immediately precedes it is enacted that "they shall assess the same accordingly to what they shall find to have been the value of such lands, estate, or interest, at the time notice was given," &c. Now the words "the same" must either mean the "value of such lands, estate, or interest," or "the purchase-money or compensation." In either view the use of the word "compensation" alone in the concluding part of the section is significant, and compensation may there have been used as meaning compensation for damage, in which sense it is used in the 32nd section. The former part of sect. 35 was probably taken from sect. 63 of the English Lands Clauses Act, 8 & 9 Vict. c. 18, and in sect. 49 of that Act a distinction is plainly made between the money to be paid for the purchase of the lands and the money to be paid by way of compensation for damages.

It appears to their Lordships that it would be a reasonable construction of the 35th section that, where an owner is entitled to compensation for damage to his lands by reason of severance from them of the land taken or the lands being otherwise injuriously affected, and there is an enhancement in value of his adjoining land, the one should be set off against the other. They

think this was the intention of the legislature, although, from the use of the word "such" before "compensation," in the latter part of the section, it may not be the literal interpretation of it.

The second question is, what is the meaning of the words "by reason of the making of such works or undertaking?" The plaintiff contended that the benefit or advantage referred to was to be confined to that arising from the making only of the railway, and not from the user of it. It is difficult to see what is the meaning of the words "any other benefit or advantage," but it is not necessary now to determine that. Any meaning which they can reasonably have would not alter that of the words which follow. Their Lordships are of opinion that "works or undertaking" as there used include works in operation, and a going concern, and that the enhancement in value may arise from the use as well as the construction of the railway.

The result is that their Lordships will humbly advise Her Majesty to reverse the order of the Supreme Court, and to order that a verdict be entered for the plaintiff for £189 5*s.* 9*d.* They make no order as to the costs of this appeal.

Solicitors for appellant: *Stanley & Woodhouse.*
Solicitors for respondent: *Freshfields & Williams.*

[PRIVY COUNCIL.]

J. C.* 1886 March 13, 16; April 9.

SOPHIE ANNE JEANNE DE CARTERET Plaintiff;

AND

PHILIPPE BAUDAINS, Constable of the Parish of St. Hélier, and Others . . } Defendants.

SOPHIE ANNE JEANNE DE CARTERET Plaintiff;

AND

THOMAS GAUTIER AND PHILIPPE BAUDAINS . . . . . } Defendants.

ON APPEAL FROM THE ROYAL COURT OF JERSEY.

Law of Jersey—Right of Way—Creation of Title to Servitude—Dedication followed by User.

By the law of Jersey a public right of way in the nature of an easement over the soil of another cannot be created by a mere dedication by the owner of the fee simple at any time followed by user of the way so dedicated. *Quære*, whether an easement or servitude can be created by any enjoyment, even from time immemorial, without proof of title; and whether forty years' possession by a parish of a way as a public way accompanied by acts of ownership would prove title in the parish to either the soil or the servitude.

APPEAL from judgments of the Full Court (Nov. 24, 1884), in two cases, in the former of which a majority of the judges decided that a certain road in the parish of St. Hélier was parish property over a width of eight feet, but that the parish was not entitled to destroy certain walls and pillars at the western extremity thereof, and ordered the defendant, the constable of the parish, to pay the appellant damages £10, and condemned the parties in costs by halves; in the latter of which the judges unanimously held that the appellant had failed to prove her claim to the ownership of a certain lane in the said parish, and that the same was public over a width of four feet, and condemned the appellant in costs.

The proceedings out of which the former appeal arose raised the

* *Present*:—Lord Blackburn, Lord Hobhouse, and Sir Richard Couch.

question of the ownership of an avenue or lane leading from a certain public road and highway called "La Pouquelaye" to the dwelling-house and premises of the appellant, both in the parish of St. Hélier. The appellant claimed the ownership of the soil of the avenue or lane, and private right of road and way thereover between her house and premises and La Pouquelaye Road as having belonged to her and her predecessors in title from time immemorial, the same not being subject to any rights of the public.

The respondents claimed that the said avenue or lane is a public road or way belonging to the parish of St. Hélier, in which it is situated, and that the appellant has no other right in the avenue or roadway than that of using it in common with the general public.

The proceedings out of which the latter appeal arose raised the question of the ownership of, and right to use, a certain path leading from the dwelling-house and offices of the appellant into a public highway and road called "Les Vaux," all situated in the parish of St. Hélier. The appellant claimed the ownership of the soil of, and the exclusive right to use the path, as having always belonged to her and her predecessors in title. The respondents claimed that the path is a public road or way belonging to the parish of St. Hélier, in which it is situated, as well as to the soil thereof, as to the right of user thereof as a way, and that the appellant has no right in the soil of the path, and no right of exclusive user thereof and no right thereon, other than that of using it in common with the general public.

The circumstances of the two cases and the proceedings therein are sufficiently set forth in the judgment of their Lordships. The nature of those proceedings is explained by the following passage from the Commissioner's report (p. 46):—

"When a cause is thus far opened on both sides (i.e. by the first pleadings), the mode of proceeding further upon it varies according to the nature of the suit. If the matter contested be a point of law or equity, unconnected with facts, or if the facts are self-evident or admitted, the cause is then immediately argued on the merits, and judgment follows. But where the questions are not of pure law, or where the facts are not admitted, a different

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course must be pursued; and, accordingly when matters of account are in dispute, the parties are sent before the Clerk of the Court to state the amount. He is supposed in these cases to sit as arbitrator between the parties, and is then designated as 'Le Greffier Arbitre.' His duty is to record their allegations on the several items, and to send back for trial by the Court the disputed items on what they have thus pleaded to issue. By a process analogous to the above, where facts depending on local circumstances are in dispute, the parties may be sent before the vicomte, who accompanies them to the spot and records their allegations. This is termed the 'Vue de Vicomte,' who may be directed either to view the premises alone and make his return upon it, or to call to his assistance six men, whose opinion he is to take upon oath and return the whole to the Court. The former proceeding is, according to Hemery and Dumaresq, adopted as the preliminary to a 'Transport de Justice,' the latter to a 'Vue de Justice,' both of which terms denote adjournments of the Court to the locus in quo. As to the 'Transport de Justice' the plaintiff and seven jurats at least must attend, but without an inquest. At a 'Vue de Justice' the bailiff and three jurats are competent to proceed with an inquest of twelve jurors; an appeal lies from this view to a 'Grande Vue de Justice' . . . . In all these cases the opinion delivered on the spot by the bailiff and jurats is not final, but requires a motion to register it in order to make it a binding judgment; which motion may be opposed, and an appeal from the decision at the Vue or Transport allowed."

Ince, Q.C., and *W. B. Heath*, for the appellant in the first case, contended that the Court below was wrong in holding that the appellant was bound to prove her title to the soil of the lane or avenue, or to prove that her right of way over it was a private right, exclusive of any right in the public. The onus was on the respondents to prove their title to the soil or to the easement claimed. The appellant was in possession, she and her predecessors had exercised acts of ownership, and the evidence shewed that the title to the soil was in her exclusively. There was the presumption of law in her favour arising from the fact that the lane in question ran through and between her own lands. There

was immemorial possession and express title as shewn by deeds which went back 100 years. On the other hand, as regards the respondents, they have shewn no title either to the soil or to the easement claimed. According to Jersey law there can be no dedication without an express grant recorded in the Royal Court. All conveyances and grants in Jersey are matters of record, and not mere acts between the parties. There is therefore no locus standi for any such legal fiction as a lost or presumed grant. Rights of way can be created by deed not by user, though they may be lost by non-user. As to private servitudes, see Le Geyt, vol. i. pp. 194–5, pas de servitude sans titre; Report of the Commissioners on the Laws of Jersey, Appendix, p. 498, No. 10,521. Compare Code Napoléon, bk. ii., tit. iv., vv. 691–707; Coutume d'Orleans par Alexandre Masson (ed. 1702), tit. xiii., cl. 1., Nos. 216, 224; Règles du Droit Français (1766), par Claude Pocquet de Livonnière, p. 89, sect. 2, art. 186. No authority is to be found in any of the sources of Jersey law to shew that the dedication of a highway can be effected in any way different from that in which a private easement is gained, viz., express grant and not by user or prescription. Otherwise there is no evidence here sufficient to support an acquisition by user. Reference was made to *Healey* v. *Corporation of Batley* (1). And there is negative evidence to shew that the road never was public, for it was never visited by the public functionaries, who according to law should annually visit public ways, note obstruction, and give notice thereof to persons obstructing, or to the owners of adjoining properties: Le Quesne's Hist. of the Laws of Jersey, pp. 35, 36 Report of Commissioners, 1861, pp. lxi., lxii.; Jersey Code (1771), pp. 63, 223; Jersey Statutes, 1812 (Roads), art. 52; 1874 (Roads), art. 47. In the second appeal they contended that the evidence did not support the decree appealed from, and relied upon similar considerations of law.

Latham, for the respondents in the first appeal, contended that in Jersey roads are more than rights of way. The soil of the roads, including cross roads, belongs to the public, and the presumption is that a road used by the public belongs to the public.

(1) Law Rep. 19 Eq. 375, 388.

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On the evidence it was proved that the public had freely used the road or lane in question as a public thoroughfare as far back as direct testimony can be produced down to the present time. The Court below decided to that effect after hearing the evidence, seeing the evidence, and inspecting the locus in quo, and its decision ought not to be disturbed unless manifestly wrong. The appellant and her predecessors in title had never succeeded in depriving the public of their right to the road. They had never acquired any right to the same against the public; and the documentary evidence on the other side was insufficient to establish a title in the appellant to either the soil or an exclusive right of way.

In the second appeal he contended that the Court below was right in holding that the title to the soil of this lane was in the parish, if not proved to be in the appellant. And on the evidence it had not been proved to be in the appellant. [LORD BLACKBURN:—It lies on you to shew such title in the respondents as to justify their acts.] The presumption in Jersey is the other way. Private roads cannot be acquired by possession sans titre. Reference was made to Merlin, Répertoire de Jurisprudence, titles Chemins Publics, Chemins de Souffrance, Chemins de Traverse; Jersey Statutes, 1874 (Roads), art. 9; Report of the Commissioners, 1861, p. 587, No. 12,028 et seq.; Coutume de Normandie, Servitudes (Godefroi), art. 607, p. 712, and art. 622, p. 736. The 100 years possession by the appellant relied on in her favour does not assist her, for there is no prescription as against the Crown: Le Geyt, vol. i., pp. 316, 317.

Ince, Q.C., replied.

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The judgments in these cases were delivered by

LORD BLACKBURN:—

DE CARTERET *v.* BAUDAINS AND OTHERS.

The appeal in this case is against a sentence of the Cour Royale of the 24th of November, 1884.

That sentence recites a previous order of the 19th of September, 1884, by which judgment was postponed until a cause pending

between the same plaintiff and Mr. Thomas Gautier and the connétable of the parish of St. Hélier, vouched by him "appelé en cause," should be disposed of, and then proceeds to say that, the last-mentioned cause having been disposed of, "the Court, in deciding on this case, has been divided in opinion, seven judges being of opinion that the plaintiff has failed in proof of her allegation that the said road was her private property; two of whom are also of opinion that the parish of St. Hélier has failed in proof of its allegation to the contrary, and three of them that the road is public to the breadth of eight feet only. One of the judges has been of opinion that the road is the private property of the plaintiff. Therefore the Court has determined that the road is parish property for a width of eight feet, and that the parish had no right to cause the demolition of the wall and pillars at the western end of the road."

The Court then condemns the connétable to pay £10 damages to the plaintiff, and condemns each party to bear half the costs.

There is also an appeal brought in the cause, in which the connétable was vouched by Gautier.

The two appeals, though arising out of nearly the same transaction, must be decided secundum allegata ac probata in the two causes, which are not identical. But it is convenient to begin by making some preliminary remarks common to both appeals.

Jersey is governed by its own law.

It was a portion of the Duchy of Normandy until that duchy was lost by King John. Its law is founded apparently mainly on the old custom of Normandy, much modified by the usage in the island and by the legislation in the island. Counsel on both sides were agreed in denying to the English common law of real property any force.

There is a law of the States of the Isle of Jersey, passed on the 7th of July, 1874, and confirmed by Her Majesty, by an Order in Council, on the 25th of July, 1874, which is to be found in the third volume of the "Lois et Règlements" of the Isle of Jersey not comprised in the Code of 1771.

It does not seem necessary to examine the system of parochial

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management before this law, which is that now in force. Probably, the old system was, in a great measure, re-enacted, though in some respects altered.

There are inspectors chosen, on whom devolves the immediate execution of the repairs of public ways; but they are under the control of the "Comité des Chemins," consisting of the connétable of the parish, three of the principal inhabitants triennially elected, and certain persons who, ex officio, have votes.

The 16th article requires the comité to receive and examine all representations made to them, and call before it those who can give information. This would seem to be for the purpose of securing that the comité shall not inadvertently fail to support roads which really are public, nor, on the other hand, inadvertently infringe the rights of individuals.

The comité have great powers as to roads already public, but they have no power to adjudicate as to whether a road is a public road or not. Any question between them and an individual as to whether a road is already public must be decided by the Court.

Their Lordships understand both sides to agree on the following matters common to both appeals. Part of them are embodied in the shape of a plan not in the record.

Both sides are agreed that a road to Pouquelaye running nearly south to north is a public road. This road passes by what, in the sentence already quoted, is described as "the western end of the road" now in dispute.

Both sides are also agreed that a road to Vaux running from south to north-east is a public road. This latter road is to the east of the road to Pouquelaye.

The road to Vaux, in the southern part of it, runs along the bottom of a valley, on the western side of which, at about a hundred yards distant from the public way, is a steep but not precipitous ridge.

On that ridge, about 900 yards east of the road to Pouquelaye and about 100 yards west of the road to Vaux, is a house and gardens, which, it is not now disputed, are the house and gardens of the plaintiff. It is not now, at least, disputed that a carriageway,

eight feet wide, leading along the top of this steep but not precipitous ridge from the plaintiff's house, and joining the public road to Vaux some way to the north-east, is the private road of the plaintiff. But, from the south-east end of the plaintiff's gardens, what is called a "ruelle," or lane, runs down this steep though not precipitous bank to the public road to Vaux.

A number of the inhabitants made a representation to the comité, in substance, that the road along this lane, and thence along what the appellant alleges to be her approach to the public road to Pouquelaye, was an immemorial public road from Vaux to Pouquelaye, improperly obstructed. The comité, as by the 16th article they were required to do, heard what was alleged on behalf of the party interested, Mme. Osmont, the appellant, who now sues in her maiden name of De Carteret. The comité, by a majority, at first decided that there was not sufficient evidence that the alleged road was public; but, on the 8th of September, 1880, it was resolved "that the said lane," described as leading from Vaux to Pouquelaye, "has been public from time immemorial, and that, in future, it should be maintained and dealt with as such by the parish."

The two actions on which the two appeals are brought were commenced on the same day, the 19th of October, 1880, with the obvious intention of preventing the road in dispute from being established to be a public road, and also claiming damages. This much may be considered as common to both appeals.

Their Lordships now proceed to deal with this appeal alone.

The plaintiff sues in the Cour Royale in her maiden name of De Carteret, setting forth that, as sole heiress of Charles de Carteret, her deceased father, she was owner of a house, outbuildings, lands and appurtenances in the parish of St. Hélier, known under the name of Mont à l'Abbé Manoir. That these premises have as their principal approach the drives which lead direct from the public road called La Pouquelaye to the said house and appurtenances. That at the extremity of this drive or approach there were for many years barriers, which were thrown down on the night of the 8th or 9th of September, 1880, or thereabouts. That on the 22nd of September, 1880, men were seen removing the remains of these barriers. On being chal-

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lenged by the plaintiff's agent they said they acted by orders of the inspector of the vingtain, Hubert. That on application to the connétable François Voisin he replied that he took upon himself all the responsibility, and that in virtue of a decision of the assemblée paroissiale of St. Hélier the drive or approach of the plaintiff were thenceforth to be treated as a public road, and she then claims damages against Voisin as connétable of the parish.

On the demand of Voisin, Philippe Aubin and John le Cronier, the then procureurs du bien public of the parish, were added as defendants; and since that time, Voisin having ceased to be connétable, Philippe Baudains, his successor, was substituted for Voisin, and Aubin having ceased to be procureur du bien public, Coutanche, his successor, was substituted for him. The parties, therefore, to this action are the appellant as plaintiff, and the connétable of the parish of St. Hélier and the procureurs du bien public of the parish as defendants, and no others.

The Vicomte was, on the 29th of October, 1881, ordered to proceed to the place in dispute to examine the state of affairs and make his reports. This he did, and it is in his report that we must look for the allegations of the parties.

The report is of considerable length.

The first meeting was on the 15th of September, 1882. The plaintiff (by her advocate) begins by pointing out to the Vicomte the approach or drive, having a breadth of about sixteen feet. The Vicomte states that he himself ascertained the breadth at the entrance and found it to be 17 feet 4 inches. She alleges that she and her predecessors have always had the possession and enjoyment of the said approach or drive, and points out the remains of the wall which had been thrown down, and says that those who did so acted illegally, because "the property on which the remains of the wall and the barriers were was not public property, but, on the contrary, for much more than forty years had been in the possession of the plaintiff and her predecessors." From this allegation she never departs. In proof of her title she produces eight documents.

It is not so easy to say what the allegations of the connétable and procureurs du bien who join in the pleadings are. Some of them

seem rather frivolous, and one, which denies the pedigree of the plaintiff, is, to avoid dispute, disposed of by an amendment made, by which she produces the register of baptism of herself, on the 23rd of November, 1827, as daughter of Charles De Carteret and Sophie Guilde, his wife, and the register of baptism of her father Charles De Carteret, on the 4th of July, 1796, as son of Charles De Carteret and Annie Le Fouvere, his wife.

Something is also said about the impossibility of this approach or drive being the property of the plaintiff and her ancestors, as Thomas Gautier, who is mentioned in the other record, owns at least one house and some property between the plaintiff's house and the road to Pouquelaye, and it is suggested that he must have some access, which must be by this road. It may probably be that he has such an access, either by title or by sufferance, and if the demolition of the barriers were justified as done by his command and as impeding his right, it would have been necessary to inquire into that. As it is, the parish justifying only in its own right, this is irrelevant. The plaintiff's allegation is not that she was the owner of the soil of the road from end to end, but only "that the property on which the remains of the wall and the barriers were was not public property, but, on the contrary, for much more than forty years, had been in the possession of the plaintiff and her predecessors." But from the terms in which some of the judges express their opinion, viz., that the plaintiff "has failed in proof of her allegation that the *road* is her private property," they seem to have been embarrassed by this irrelevant allegation. It is alleged that the way is a public highway from time immemorial, but there is no allegation that at any time whatever was anything done by the parish to it as a public road, either by repairs, or by visiting it as a public road, or by exercising the right of branchage.

It is alleged that the plaintiff and her ancestors could not by any length of prescription acquire a right against the public, but, to raise this question, it is necessary first to establish that the public right did at one time exist.

The documents given in evidence shew that Philippe De Carteret purchased in 1786 what is now the nursery belonging to J. Le Cornu, described in the deed as "bounded on the south

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by the road which leads to the house which formerly belonged to Elizabeth Guerdon, the mother of Philippe De Carteret," a description which, though it does not conclusively shew that the road was not then treated as public, is much more consistent with its being a private road.

The next document, dated the 19th of September, 1795, is between Philippe De Carteret of the one part (which Philippe De Carteret is described as eldest son of the deceased Philippe De Carteret and Elizabeth Lempriere, his wife, and principal heir of that Philippe De Carteret, his father, and another Philippe De Cartaret, his grandfather), and Charles De Carteret and Hugh De Carteret of the other part, described as the younger sons of the late Philippe De Carteret and Elizabeth Lempriere, his wife. It is made for the purpose of making an amicable division between them of all the heritages which have come to them by the deaths of their father and mother, and the late Philippe De Carteret, their grandfather, that they may enjoy them separately in the future. An objection was made that a partage could not give title, but no reason appears why, if possession follows, and is consistent with its terms, it should not be as good as any other instrument to shew what the title was under which that possession was enjoyed.

Philippe De Carteret, the elder son, takes as part of his share the property now belonging to J. Le Cornu, then called Philippine and Du Maillier.

He agrees that, when the trees planted on the south side of the fence of the Close Du Maillier shall be cut down, neither he nor his heirs shall be at liberty to replant them, and it is agreed that Philippe shall have no right, by "the said share of Charles, to go by that way to the Close Philippine, belonging to the said Philippe, which is on the west side of Du Maillier."

Charles De Carteret, the second son, grandfather of the plaintiff, takes as his portion, amongst other things, the house of his father in the parish of St. Hélier, with the offices and "with the drive or approach in front, and a road eight feet wide from the back leading to the public road." Notwithstanding some quibbling, it seems impossible to doubt that this house is that which has since continued in the enjoyment of the plaintiff's grandfather,

father, and herself from 1795 down to the present time; that the road eight feet wide leading to the public road is that leading to Vaux, not now alleged to be public; and that by "the drive or approach to the front" is meant to be designated the same road as is designated in the deed of 1786 as "the road which leads to the house which formerly belonged to Elizabeth Gourdain," who was the grandmother of Charles, and the great-grandmother of Charles the father of the plaintiff.

Philippe, by a deed dated the 25th of June, 1808, conveys Du Maillier to Charles.

And by another, dated the 21st of October, 1809, conveys, amongst other property, Philippine to David de Gruchy and his wife.

They, by a deed dated the 8th of February, 1811, convey Philippine to Jean Syvret.

Charles De Carteret, the grandfather of the plaintiff, by a deed dated the 6th of January, 1816, conveys Du Maillier to the same Jean Syvret, and in it it is expressly stipulated that Syvret, the purchaser, must make for himself access through his own land, as he is to have none through the drive or approach of the vendor, Charles de Carteret.

Syvret, in 1862, conveys both Philippine and Du Maillier to J. Le Cornu, who now holds them.

Charles de Carteret, the grandfather, also takes as part of his share the Close de la Classe, which lies to the south of this road in dispute, and it is still enjoyed by the plaintiff.

There seems therefore shewn on the deeds, as clearly as it is possible to do, that those who were in possession of the house of the plaintiff and the lands both north and south of the part of the road in question on which the alleged trespass has been done, have, at least from the beginning of this century, treated this road as the approach or drive to the plaintiff's house.

Their Lordships do not doubt that this, though strong evidence in favour of the plaintiff, may be rebutted by shewing a counter title, or perhaps even an adverse possession during the period of prescription. But on the report of the Vicomte there appears to be nothing but an allegation that it was an immemorial public road, and no allegation of any proof of it.

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On the transport du justice evidence was taken. It is proved clearly enough that there were no barriers during the lifetime of Charles the grandfather. On his death Charles the father did, at a time which is pretty clearly proved to be not before 1852, not yet forty years ago, cause the barriers to be erected, asking and obtaining leave from Jean Le Syvret, the owner of the land to the north, to put up one of the pillars on Syvret's land.

Before that the road was open to the west. It is proved, as far as the negative can be proved, that there was never at any time anything done to the road of that kind which ought to have been done, and probably would have been done, if it was a public road. It never was at any time visited as a public road should be, either to inspect it or to cut the branches, nor was it proved that any repairs were done by any one but the De Carterets and their farmers. It seems proved that no carriages ever went along it except to the houses of the plaintiff and of Gautier. And there is very little, and that not very satisfactory, evidence that beasts of burden ever went from Pouquelaye to Vaux along that road.

There is evidence no doubt that foot passengers went along it, and that Charles Carteret, the grandfather, sometimes met them and spoke civilly to them, and did not attempt to stop them. And if the law of England prevailed in Jersey, and a public right of way in the nature of an easement over the soil of another could be created by a mere dedication by the owner of the fee simple at any time, and a using of that way so dedicated for a time, however short, it may be that this would be some scintilla of evidence of a dedication by Charles the grandfather. But this is so far from being the law of Jersey, that the doubt is whether an easement or servitude can be created by any enjoyment, even from time immemorial, without proof of title.

Their Lordships wish not to be understood as deciding a question which does not arise. It may be, or it may not be, that a forty years' possession by the parish of a way as a public way, accompanied by acts of ownership, such as repairing the road, cutting the boughs, and so forth, would prove that the soil was in the parish; or it might perhaps be sufficient title to support a servitude in the parish. On this they give no opinion. But they think that in this case the evidence is all in favour of the soil of

the spot where the alleged trespasses were committed, being in the plaintiff, and that there is no evidence at all that there ever was at any time whatever a public road of any breadth.

Their Lordships will humbly advise Her Majesty, accordingly, that the order appealed from should be reversed, the respondents to pay the costs of this appeal, and that the cause be remitted to the Cour Royale to do what is just.

DE CARTERET *v.* GAUTIER AND ANOTHER.

In this case the plaintiff sued Thomas Gautier, alleging that in her quality as sole heir of the late Charles de Carteret, her father, she is proprietor of a house, offices, lands, appurtenants, and dependencies known by the name of Mont à l'Abbé Manoir. That Gautier threw down a hedge on the kitchen garden, one of the dependencies of her house, and dug a trench there which impeded her access to her kitchen garden, and other wrongs. And claims that he be ordered to rebuild it and pay damages.

Gautier, reserving all other defences, pleads that he acted under the orders of Voisin, the connétable, and Hubert, one of the inspectors of the parish of St. Hélier, and did no more than was necessary to restore to its ancient state a lane leading from Vaux to Pouquelaye, which, from time immemorial, had been used as a public road from Vaux to Pouquelaye, and prays that the connétable Voisin and the inspector Hubert should be summoned.

Voisin appeared and assumed all the responsibility, and Hubert was therefore dismissed from the suit. Subsequently, on Voisin ceasing to be connétable, Baudain, his successor, is substituted as appelé.

After a report by the Vicomte, and each party having produced their titles and evidences, the sentence appealed against was pronounced.

It is as follows:—

The Court is unanimously of opinion that the plaintiff has failed in the proof of her pretence that the soil of the lane is her private property. Therefore en suite the Court has declared the said lane to be public for a breadth of four feet, and discharges both the defendant and the vouchee from the action, and condemns the plaintiff in costs.

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The title on which the plaintiff rests in support of her claim to be owner of the soil consists in shewing that she, her father Charles, and her grandfather also Charles, have, from 1796, when Charles took this house and appurtenances as part of his share of the inheritance divided under the deed of partition already mentioned, a period of more than forty years, been in possession of the house, gardens, and the lands on both sides of this lane.

There is nothing in the descriptions in the deed of partage which can be construed as referring to this lane either one way or the other. But the plaintiff has shewn that she and her father and grandfather have during this long time occupied by themselves and their farmers the lands on each side of this narrow lane as their own. This is not conclusive to shew that the soil of the lane was also hers, but it makes such a case that the lane was parcel of the premises enjoyed by the plaintiff and her ancestors, as throws a strong onus on those who assert the soil to belong to some other to shew possession adverse to the plaintiff, or a title in that other. Acts of ownership are proved on the part of the plaintiff and of her father on the lane itself, but these are within the last forty years, and principally serve her case as throwing light on what was done before that period.

It is proved that it was not until the death of Charles the grandfather that Charles the father in 1854, within the forty years, made the alterations in the garden which the defendant, alleging them to obstruct what he alleges to be a public way, has removed. And it is also proved that about the same time Charles the father put up two stone pillars, with an iron bar across them, at the entrance from the public road to Vaux into this lane. But it is also proved that in the time of Charles the grandfather, as early as 1808 or 1809, a wooden bar was put up there, and this was more than forty years ago.

The evidence against this is that the lane was there, and that foot passengers used it.

Their Lordships refer to what they have said in the other appeal: such evidence is not enough to establish a public way. Whatever might be the effect of long-continued treatment of the way as public by repairing it, or visiting it, or enforcing the cutting of the branches, there is no such evidence here.

Their Lordships are therefore of opinion that, in the absence of

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evidence that the soil in the lane belongs to anyone else, the plaintiff has proved it to be hers: and that there is no evidence that there ever, at any time whatever, was a public road of any width whatever.

They will, therefore, humbly advise Her Majesty that in this case the order appealed from should be reversed, the respondents to pay the costs of the appeal, and that the cause be remitted to the Cour Royale to do justice therein.

Solicitors for appellant: *Saunders, Hawksford, Bennett, & Co.*
Solicitors for respondents: *Lambert, Petch, & Shakespear.*

[PRIVY COUNCIL.]

ATTORNEY-GENERAL OF NOVA SCOTIA APPELLANT;

AND

GREGORY . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF CANADA.

Practice—Special Leave to appeal.

Where by special agreement sanctioned by the Court the petitioner had come in and consented to be made a party to the cause in appeal, and to be bound by the order of the Supreme Court to be made therein, but by the terms of the agreement the powers of the Supreme Court were defined and restricted, and its order to be "considered a final disposition of all contentions whether now in litigation or not":—

Held, that the Supreme Court in deciding the case was acting under the terms of a special reference and not in its ordinary jurisdiction as a Court of Appeal.

Special leave to appeal refused.

THIS was a petition for special leave to appeal, under the circumstances stated in the judgment of their Lordships, from a judgment of the Supreme Court of Canada dated the 24th of March, 1885.

Bompas, Q.C., and *Jeune*, for the petitioner.

Romer, Q.C., and *Bray*, for the respondent.

* *Present*:—LORD BLACKBURN, LORD HOBHOUSE, and SIR RICHARD COUCH.

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The judgment of their Lordships was delivered by

LORD HOBHOUSE :—

In this case Mr. Gregory obtained a verdict against the Halifax Company for $80,000 after a trial in the Supreme Court of Nova Scotia. The company appealed to the Supreme Court of Canada, and the only real question was, whether $40,000 of the $80,000 should be paid to Mr. Hill instead of being paid to Mr. Gregory the plaintiff. It was a matter of indifference to the company whether they paid Hill or Gregory. Therefore the company appealing were really acting on behalf of Hill, and it is agreed that Hill represented the Government of Nova Scotia, who now appear by their Attorney-General. Gregory obtained $40,000, part of the $80,000, from another source. That was then out of the question. He could not obtain that over again under his verdict against the Halifax Company. When the parties got before the Supreme Court of Canada it was thought that, as the case was then confined to the $40,000 in which the Government of Nova Scotia alone was interested, it was better to have the real parties in direct conflict with one another. A special agreement was made for that purpose in the presence of Mr. Justice Strong and by the sanction of the Court. Upon that agreement the Attorney-General of Nova Scotia was to come in and consent to become a party to the cause, and to consent that the province of Nova Scotia should be bound by the order to be made on the appeal. Then the agreement goes on to say what the Court is to do, and it is in the form common to arbitration agreements. It does not say that when the Attorney-General of Nova Scotia has been substituted for the Halifax Company as a party the Court is to exercise all its ordinary jurisdiction in appeal, but it goes on to give the Court a number of special powers, and to restrict its powers in some respects. The respondent's right, that is Gregory's right, is to be limited to a claim for damages on certain grounds that are mentioned. The Court receives special power in determining the question to have regard to all equitable as well as legal rights of the parties arising from the facts and documents in evidence without reference to the pleadings or the present state of the record. Well, that obviously points to a

question to which Mr. Bompas has referred at considerable length, viz., the question as to the validity of an agreement between Gregory and Hill, under which Hill claims the $40,000, and on which an opinion has been expressed apparently by one of the judges that the agreement was obtained under undue pressure and influence. Then there are a number of other special provisions for the guidance of the Court. The Court is to have power to make such order as to costs as to it shall seem meet, and as it would have power to do in a suit in equity. Ultimately the agreement winds up by saying: "The order to be made pursuant to this agreement shall be considered a final disposition of all contentions whether now in litigation or not," arising under the articles which are the subject of dispute in the suit.

Their Lordships consider that in deciding the case the Supreme Court was not acting in its ordinary jurisdiction as a Court of Appeal, but was acting under the special reference made to it under this agreement.

Their Lordships are disposed to think that even if it were open to them to give leave to appeal in this case, the questions raised are not of sufficient magnitude or public interest to induce them to depart from the ordinary rule, that persons who have gone to the Supreme Court of Canada and have there failed shall not proceed to appeal to Her Majesty in Council; but they do not go into that, because they consider that in this case an appeal does not lie to the Queen in Council.

Their Lordships think that this petition should be dismissed with costs.

Solicitors for petitioner: *Bompas, Bischoff, Dodgson, & Coxe.*
Solicitors for respondent: *Hill, Son, & Richards.*

[HOUSE OF LORDS.]

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I. B. COAKS, C. J. BUNYON, F. E. WATSON, W. CADGE, E. K. HARVEY, C. BAILEY, AND J. CROSS . . . . . } APPELLANTS;

AND

J. F. BOSWELL AND OTHERS . . . . RESPONDENTS.

Vendor and Purchaser—Sale under the Direction of the Court—Misrepresentation and Concealment of Facts by Purchaser.

The proposition laid down by the Court of Appeal, that "a person desirous of buying property which is being sold under the direction of the Court must either abstain from laying any information before the Court in order to obtain its approval, or must lay before it all the information he possesses, and which it is material that the Court should have to enable it to form a judgment on the subject under its consideration," is too broadly stated.

It does not follow that because information on some material point or points is offered, or is given on request, by a purchaser from the Court, it must therefore be given on all others as to which it is neither offered nor requested, and concerning which there is no implied representation, positive or negative, direct or indirect, in what is actually stated.

The decision of the Court of Appeal (27 Ch. D. 424) reversed upon the evidence, and the order of Fry J. (23 Ch. D. 302) restored.

APPEAL from a decision of the Court of Appeal.

The following is an outline of the material facts not in dispute which are stated at length in the report of the decisions of Fry J. (1), and of the Court of Appeal (2).

Sir R. Harvey, a partner in Harveys & Hudsons, died in July 1870. A few days later his partners were adjudicated bankrupt; Bailey was appointed trustee in the bankruptcy; and Watson became a member of the committee of inspection. Two suits, *Lacey* v. *Hill*, and *Leney* v. *Hill*, were brought against Sir R. Harvey's executor for the administration of his estate in Chancery; *Lacey* v. *Hill* on behalf of Sir R. Harvey's separate creditors; and *Leney* v. *Hill* on behalf of the creditors of the firm. A decree for administration was made in both suits. Part of Sir R. Harvey's estate consisted of an interest during the life of E. K. Harvey in a fund of about 300,000*l*. In January 1872

(1) 23 Ch. D. 302. (2) 27 Ch. D. 424.

an order was made in *Lacey* v. *Hill* and *Leney* v. *Hill* for the sale of the life interest. The appellant Coaks was the solicitor to the defendant Hill in those suits, and had an interest in the plaintiffs' costs of suit. On Coaks' application leave was given to him by Lord Romilly M.R. to bid at the sale on certain conditions, the sale to be carried out independently of Coaks by Linklater & Co. the solicitors for the plaintiffs in both suits.

On the 2nd of July 1872 the life interest was put up for sale by auction, but was not sold. On the 26th of July under an order of Lord Romilly M.R. the life interest was purchased for 40,000*l.* by Coaks and the appellant Bunyon, an actuary, acting on behalf of themselves and of Bailey, Watson, E. K. Harvey, and another. The purchase was effected after much negotiation and correspondence between Coaks and Bunyon on behalf of the purchasers, and Brown, a partner in Linklater & Co., with respect to the insurability and probable duration of the life of E. K. Harvey, the cestui que vie, upon which the value of the life interest in great measure depended. The present action was brought in 1881 by unsatisfied creditors of Sir R. Harvey and of his firm against Coaks and others to set aside the purchase. Fry J. dismissed the action (1). The Court of Appeal (Baggallay, Cotton, and Lindley L.JJ.) reversed this decision and set aside the contract of purchase upon the ground of misrepresentation and concealment of facts, and in particular upon the grounds that a letter from Dr. Fuller of the 4th of July 1872 (called "the opinion of Dr. Fuller" in the judgment of the Court of Appeal (2)), and certain negotiations and arrangements with some Scotch and other insurance offices had been intentionally and carefully kept back in order that the Court might be misled. From this decision the defendants appealed: the arguments turning mainly upon the question whether the Court of Appeal had taken the right view of the evidence.

Dec. 9, 10, 11, 14, 15, 1885. *Horace Davey* Q.C. (*Rigby* Q.C. and *Northmore Lawrence* with him) for the appellants:—

The Court of Appeal seem to have laid down a rule that purchasers from the Court of Chancery incur a greater obligation

(1) 23 Ch. D. 302. (2) 27 Ch. D. 424, 453.

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than purchasers from an ordinary vendor; that in fact the maxim caveat vendor does not apply to such purchases. There is not a trace of authority for such a proposition in any decided case. The appellants also demur to the doctrine apparently laid down by the Court of Appeal, that disclosures to the chief clerk in chambers are not disclosures to the judge. The chief clerk is the judge in chambers, and his orders are drawn up as the orders of the judge. [They also contended upon the facts that there was no misrepresentation or concealment.]

Montague Cookson Q.C. and *A. G. Langley*, for such of the respondents as were plaintiffs, contended that the view taken by the Court of Appeal of the facts was correct: but that if it were not, Coaks was not in the position of an ordinary purchaser but occupied a fiduciary relation: that the leave to him to bid did nothing more than remove the absolute disability to become a purchaser, and did not relieve him from the obligation of disclosing all those facts which a person in a fiduciary position would be bound to disclose: that the effect of the leave to bid was exhausted when the attempted sale by auction failed, and that after that event the full fiduciary relation of Coaks revived and prevented him altogether from being a purchaser.

In illustration of the duties incumbent upon persons in such a position as Coaks they referred to *Turner* v. *Harvey* (1); *Brownlie* v. *Campbell* (2), per Lord Blackburn; *Redgrave* v. *Hurd* (3), per Jessel M.R.; *Pooley* v. *Quilter* (4); *Walters* v. *Morgan* (5); *Ex parte James* (6); *Brooke* v. *Lord Mostyn* (7). They also contended that Bailey and Watson occupied a fiduciary position towards the creditors of Sir R. Harvey which disabled them from purchasing; and that in any event the benefit acquired by them as well as by Coaks by reason of the purchase, ought to be declared to belong to the creditors of Sir R. Harvey.

Whitehorne Q.C. for the respondent Grant, public officer of the Norwich Union Life Assurance Society, mortgagees.

(1) Jac. 169, 178.
(2) 5 App. Cas. 950.
(3) 20 Ch. D. 13.
(4) 2 D. & J. 327.
(5) 3 D. F. & J. 718.
(6) 8 Ves. 337.
(7) 2 D. J. & S. 373.

H. R. Knipe for the respondent Hill.

Davey Q.C. in reply. The cases cited have no bearing except on the supposition that Coaks had a fiduciary relation to the vendors. That ignores the leave to bid, the effect of which was to discharge him completely of that fiduciary relation, and to place him at arm's length with the vendors, not only as regards the auction, but as to the private treaty for sale.

The House took time for consideration.

Feb. 22, 1886. EARL OF SELBORNE:—

My Lords, if I agreed with the view of the facts of this case which has been taken in the Court of Appeal, I should think the decree of that Court right. The time which had elapsed between the purchase sought to be set aside and the commencement of this suit might have been a serious obstacle to the relief sought, if rested on any other ground than that of fraud; but if fraud were proved, that difficulty would be overcome.

The Court of Appeal thinking that fraud was proved, did not deal with the question which Fry J. had decided in the defendants' favour; which was, whether the defendants or any of them were in such a fiduciary relation towards the vendors or the Court as to disable them from purchasing, or from holding their purchase (under the circumstances of this case), however unimpeachable the contract might have been if they had not stood in that relation. That question was again argued before your Lordships, and you have to decide it. But I think it convenient in the first place to consider the ground on which the Court of Appeal proceeded; and for that purpose to treat the position and the obligations of the defendants (appellants here) as not differing from those of an ordinary purchaser, standing in no special fiduciary relation to his vendor. Every such purchaser is bound to observe good faith in all that he says or does, with a view to the contract, and (of course) to abstain from all deceit, whether by suppression of truth, or by suggestion of falsehood. But inasmuch as a purchaser is (generally speaking) under no antecedent obligation to communicate to his vendor facts which

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may influence his own conduct or judgment when bargaining for his own interest, no deceit can be implied from his mere silence as to such facts, unless he undertakes or professes to communicate them. This, however, he may be held to do, if he makes some other communication which, without the addition of those facts, would be necessarily or naturally and probably misleading. If it is a just conclusion that he did this intentionally, and with a view to mislead in any material point, that is fraud; and it is a sufficient ground for setting aside a contract, if the vendor was in fact so misled. A man is presumed to intend the necessary or natural consequences of his own words and acts; and the evidentia rei would therefore be sufficient without other proof of intention. If the vendor was not, in fact, misled, the contract could not be set aside; because a "dolus" which neither induced nor materially affected the contract is not enough.

I by no means dissent from the opinion that a Court of Justice, when it has to approve of a sale on behalf of persons or classes under its protection, ought to be strict, even to jealousy, in exacting from a purchaser the fulfilment of his obligation to be honest and straightforward in all statements relevant to the duty which the Court has to perform, whether made voluntarily, or in answer to questions, or arising out of the terms of any proposal or preliminary agreement.

With this preface I turn to the judgment of the Court of Appeal delivered by Baggallay L.J., where I find this conclusion drawn from the evidence:—That the purchasers in this case offered and gave to the then Master of the Rolls (Lord Romilly) information which, "though not in itself untrue, was misleading and intended to mislead, inasmuch as other information which was within the knowledge of the purchasers, and of which they were well aware that the Court was ignorant, and which if known would have led the Court to a different decision, was intentionally and carefully withheld" (1). In a later passage (2) his Lordship specifies certain material facts as having been "intentionally and carefully kept back in order that the Master of the Rolls might remain impressed with the belief that the defendant Harvey's life could not be insured at less than a 12 per cent. premium;"

(1) 27 Ch. D. 445. (2) 27 Ch. D. 453, 454.

and adds that the purchasers, having proposed to furnish the materials to enable Lord Romilly to form his own opinion "knew the materials which they did furnish" to be "incomplete and calculated to mislead and (that) they had further materials which, if disclosed, would have given a different complexion to the case, and could hardly have failed to lead the Master of the Rolls to decline their offer." Such conduct is justly described in the passage of the judgment which immediately follows, as amounting to fraud.

The appellants have undertaken to shew that these conclusions are not supported by the evidence; that they honestly gave the vendor and the Court all the information which they ever proposed, or undertook, or were in any way bound to give; and that there was no misrepresentation or suppression of any material fact, on their part, by which the Court was or could have been misled. The question is as to the true effect of the evidence.

The subject of this purchase was the right to receive, during the life of the appellant Edward Kerrison Harvey, the income of certain trust funds of very large amount under a residuary gift contained in the will of that appellant's father, General Harvey. Mr. E. K. Harvey was forty-five years old at Christmas 1871. The late Sir Robert Harvey, whose estate was under administration in the suits of *Lacey* v. *Hill* and *Leney* v. *Hill* in 1872, had acquired this life interest by purchase from the appellant, his brother, and on the 25th January 1872 it was ordered to be sold, with the approbation of the judge. The appellant Coaks, a solicitor at Norwich (where the Harvey family was well known), was professionally concerned in the suits for Sir R. Harvey's executor, and was otherwise interested in the costs of some of the parties. This would have disabled him from purchasing without the leave of the Court; but he obtained leave to bid in March 1872, the conduct of the sale being given to the plaintiffs in *Lacey* v. *Hill*, whose solicitors were Messrs. Linklater & Co. Mr. Brown, one of that firm, attended to this business; and in his evidence (if believed) there is nothing unfavourable to the appellants' case. The respondents' counsel were careful not to impute to him fraud, or connivance at fraud, or indeed any other breach of duty; and, under these circumstances, I think your

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Lordships are bound to give credit to his statements, when there is nothing to displace or contradict them.

There were two questions by which the marketable value of the subject of this sale was necessarily and greatly affected; one as to the amount of the income, on the receipt of which, during Mr. E. K. Harvey's life, a purchaser might be entitled to rely; the other, as to the power of a purchaser to protect himself against loss by insuring that life. On the first point, no purchaser could have better means of knowledge than the Court; the trustees under General Harvey's will had duties to the reversioners, as well as to the owner of the life interest; and it was stated in the conditions of sale, prepared by one of the conveyancing counsel to the Court, that the investments of the trust funds were liable to variation at the discretion of the trustees, and that some of the existing investments were considered to be unauthorized and irregular, and productive of a larger income than they would produce if converted into proper securities. The income from the existing investments exceeded £13,000, and it appears from some parts of the evidence that the possible reduction by changes of investments was estimated (at least by the appellants) at not less than £4000. On the other point, the insurability of Mr. E. K. Harvey's life, the circumstances were peculiar; he had been afflicted, when very young, with a dangerous disorder, called hydrocephalus, which had left some permanent effects on his constitution and his appearance, and made it improbable, according to medical experience, that he could live to old age; but he was not disabled from the ordinary business and duties of life, and his health seemed to improve, rather than otherwise, as he got older. I must refer to some correspondence which passed on that subject before July 1872, treating Mr. Coaks's letters to his own agents Messrs. Sharpe & Co., of which the substance was meant to be communicated to Messrs. Linklater, or the chief clerk of the Master of the Rolls (Lord Romilly), in whose Court the suits were depending, as communications to the vendors, and the Court.

[His Lordship then went in detail through the voluminous evidence, documentary and oral, bearing upon the question of fraud, and came to the conclusion that there had been no misre-

presentation or suppression of any material fact by which the Court could have been misled. As to Dr. Fuller's letter of the 4th of July, his Lordship found that it was actually, during the course of the treaty, produced to the vendors and communicated by Brown to the chief clerk. As to the Scotch and other insurances, his Lordship, after referring to the evidence, proceeded as follows:—]

Mr. Coaks' letters received by Mr. Brown on the 21st of July, seem to me, under these circumstances, conclusive as to the good faith of the purchasers, with respect (at all events) to the insurances which they have been charged with wilfully concealing. So far from "keeping them back" (if they had previously done so with any dishonest purpose, the motive for not disclosing them then would have been stronger still), they urged their existence as a reason why the contract should be confirmed. "I do not" (said Mr. Coaks in the first letter) "want to give unnecessary trouble; but as the purchasers have already acted upon this contract by effecting insurances, on very high terms of course, I must now, as the legal adviser of the purchasers, see that there is no omission of any formality necessary to perfect the contract." In the second letter: "Confessedly, if there had not been this omission, the matter was settled, and the deposit paid, and we have, unfortunately, acted upon this by actually covering our risk, so far as we could, by taking up the Clerical and Medical policy, *and some others*, which of course we should not have done had we not considered the contract complete."

If Mr. Brown did not put these letters into the hands of the chief clerk, or of Lord Romilly, that was no fault of the appellants. He was asked whether he discussed their contents (as to insurances) with the chief clerk? His answer was: "As I have already said, whether it was when we first found out about the mistake, or whether it was on that morning, we discussed generally the question of their having now obtained insurances, and whether it would not be desirable perhaps to put the life interest up to auction again." (*Q.*) "After discussing it, what was the conclusion come to with reference to that?"—(*A.*) "That it would be no good doing so, as the policies did not belong to us. In the meantime of course we were standing the risk of the life and

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might lose the £40,000." The terms of insurance were not, indeed, mentioned in those letters, except as being "very high." If Mr. Brown's recollection of what he knew on the 17th of July, is to be trusted, he was not ignorant of them, for he knew the terms of the Pelican office, and that they had "followed the Scotch offices." He asked no question on that subject; if he had done so, it would then have been for Mr. Coaks to exercise his discretion as to answering or not.

There are two passages in the judgment of the Court of Appeal on which I think it right to make some remark, as they may seem to affect questions of principle. At pages 453, 454 of 27 Ch. D., it is said that "a person desirous of buying property which is being sold under the direction of the Court, must either abstain from laying any information before the Court in order to obtain its approval, or he must lay before it all the information he possesses, and which it is material that the Court should have to enable it to form a judgment on the subject under its consideration." As a general and abstract proposition this seems to me to be too broadly stated. I do not think that, because information on some material point or points is offered, or is given on request, by a purchaser from the Court, it must therefore be given on all others, as to which it is neither offered nor requested, and concerning which there is no implied representation, positive or negative, direct or indirect, in what is actually stated. The case of *Brooke* v. *Lord Mostyn* (1), referred to by the Court of Appeal, was unlike the present. I prefer to state the doctrine necessary for the decision of this case in the terms in which I have endeavoured to express it at the outset of this opinion.

The other passage is at page 456 of 27 Ch. D.; where the Court intimate, that, even if Mr. Brown was informed of the Scotch assurances, the appellants ought to be held responsible for any failure on his part to communicate that information to the Master of the Rolls; and that it was the duty of Mr. Bunyon to see to this, "and, if necessary, to supply any omission in that respect on the part of Mr. Brown." These conclusions ought perhaps to be taken as dependent upon the context, in which it is said that

(1) 2 D. J. & S. 373.

Mr. Bunyon "must have been well aware, or at least had very good reason to believe, that the Master of the Rolls had no information, either through Mr. Brown or from any other source, upon the subject of the Scotch insurances." If so, I think it enough to say (without going further into the question whether it was necessary for the judge to have that information), that I am unable to see what there was to make Mr. Bunyon know, or have any reason to believe, that Mr. Brown did not, in this respect, do his duty. Unless Mr. Brown's evidence is disbelieved, the fact of some such insurances having been effected was not only known to him, but was communicated by him to the chief clerk; and I should think it reasonable to presume, from the evidence, that it was also communicated by the chief clerk to Lord Romilly. In the absence of any improper collusion between the purchasers and Mr. Brown, or at least clear notice that Mr. Brown was neglecting his duty, I am of opinion that the purchasers were not bound to watch or suspect the solicitor for the vendors, or to interfere between him and the chief clerk or the judge, for the purpose of seeing that all material communications made to him were brought to the personal knowledge of the judge. No charge of collusion is made against Mr. Brown, and if in any respect he did neglect his duty (of which I see no proof), I cannot discover anything to fix the purchasers with notice of that neglect. The question is not, whether the Court did what was best and wisest for the benefit of Sir Robert Harvey's creditors, but, whether the purchasers obtained their bargain by means of any malpractice or fraud. They had a right to get the best bargain they could, provided they did it honestly, without the use of any improper means, or failure in any duty incumbent on them. If your Lordships had been called upon, on an appeal competently brought, to review Lord Romilly's judgment on Mr. Coaks' application for leave to bid, or as to the propriety of confirming the contract after the opinions given by the actuaries on the 22nd and 23rd July 1872, you might very possibly (indeed I think probably) have differed from that learned judge; but you cannot find the purchasers guilty of fraud because you may think there was too great facility in giving its sanction to the purchase on the part of the Court.

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My conclusion is, that the judgment of the Court of Appeal, on the facts of this case, cannot be sustained.

Upon the other point I agree with Fry J. The leave to bid put an end to Mr. Coaks' disability to purchase, on account of his mere position as solicitor on the record for the executor, or as interested in the plaintiff Lacey's costs of the suit. It was contended that, when the auction failed, the leave to bid came to an end, and the disability returned. I do not think so. The whole treaty was with the Court, and grew out of the leave to bid. I see no ground for thinking that, by their subsequent correspondence with Messrs. Linklater & Co., Mr. Coaks or Mr. Bunyon violated the conditions on which the leave to bid had been given, or that the sale was not conducted independently of the purchasers by Linklater & Co. As to the other purchasers, your Lordships have not to decide any question between Messrs. Bailey & Watson and the bankrupt estate, for which one of them was a trustee, and the other a member of the committee of inspection. Towards Sir Robert Harvey's estate neither of them stood in any such relation as to render them incapable of purchasing (without leave) part of that estate, when sold under the direction of the Court; and no particular conduct on the part of either of them is alleged which can make the sale, as against them, impeachable.

I think that the order appealed from ought to be reversed, and that of Fry J., dismissing the action with costs, restored.

As to costs, there are some things in this case which might have made me hesitate, if the action had been brought when the purchase was recent, and before what was then an uncertain, had turned out a profitable, speculation. But, as it was not brought until after a delay of more than eight years, and after the risk had been decided in the purchasers' favour, I think the costs ought to follow the event; that is, that the respondents (other than the respondents Grant and Hill) should pay the costs here, and also in the Court of Appeal. The substitution of creditors who knew nothing about the facts, for those creditors by whom the sale had been conducted, and who, knowing all the facts, did not complain, is certainly no reason why the respondents should be exonerated from costs.

LORD BLACKBURN:—

My Lords, when this case was before Fry J. (1) the decision of the learned judge was not on the question of fraud, which seems not to have been relied on before him. But on its coming before the Court of Appeal it was relied on, and then the Court of Appeal allowed fresh evidence to be given by the purchasers, and after hearing that, on the whole evidence determined that fraud was made out.

The very voluminous evidence, both documentary and vivâ voce, was brought before this House. The counsel for the appellants (judiciously, I think, as a matter of advocacy in the particular circumstances) took upon themselves the burthen of shewing that the conclusions as to fraud, drawn by the Court of Appeal from the evidence, were not justified by that evidence, and there was a long argument. At its conclusion, I was strongly impressed with the conviction that the appellants' counsel had succeeded in shewing that the conclusions drawn by the Court of Appeal as to fraud were not justified by the evidence.

There is no doubt that as events have turned out, Mr. Harvey being now (thirteen years after the sale) alive, the transaction has proved a very profitable one for the purchasers. And as the insurances made by them were on the basis of paying the premiums for a period which, as it turns out, the life has survived, the companies who made those insurances have no reason to repent having made them.

And it may be (though I think we are not to be too much influenced by what has turned out to be the fact) that if the question were whether if there had been proper and business-like exercise of discretion on the part of those who were acting for the creditors of Sir Robert Harvey, a larger price would have been obtained, I might think so. But that is, I think, not the question.

I think the judgment of the Court of Appeal on the facts cannot be sustained.

I have great respect for the opinion of the Court of Appeal, and I should not have come to this conclusion without carefully examining the evidence and forming my own opinion upon it;

(1) 23 Ch. D. 302.

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but after reading in print the opinion of Lord Selborne, I do not think I have anything to say as to the evidence which is not to be found in it. On the rest I agree with him.

LORD WATSON:—

My Lords, I concur in the judgment which has been delivered by the noble and learned Earl, and I have nothing to add.

LORD BRAMWELL:—

My Lords, I also entirely concur. The noble and learned Earl has so entirely expressed my opinions as to the facts, as to the conclusions to be drawn from them, and as to the law applicable to them, that I could not advantageously add another word to what he has said.

LORD FITZGERALD:—

My Lords, although I acquiesce in the judgment which your Lordships have indicated, I desire to say that I do so with hesitation and some unwillingness.

I have carefully attended to and considered every word of the elaborate reasons expressed by the noble and learned Earl, and of his critical examination of the facts in evidence; yet I have not been able to relieve myself from the impression that Lord Romilly was, I will not say overreached, but misled in an important particular.

The question before us however on this appeal is whether fraud has been actually proved.

Baggallay L.J. in his judgment, when he defines the obligations of intending purchasers in dealing with the Court, says: "A person desirous of buying property which is being sold under the direction of the Court must either abstain from laying any information before the Court in order to obtain its approval, or he must lay before it all the information he possesses and which it is material that the Court should have to enable it to form a judgment on the subject under its consideration." The rule thus expressed is to some extent too wide, and ought to be limited thus,—that if he professes to give the Court information on any

particular subject with a view to guide its discretion and obtain its approval of the proposed sale, he is bound to lay before the Court all the material information he possesses on that particular subject. Thus in the present case if the defendants professed to lay before Lord Romilly information as to the insurability of the life of E. K. Harvey, including the annual rate at which insurances could probably be effected, they were bound to lay before him all the information which they had on that very material matter.

The origin of this litigation was the order permitting Mr. Coaks to bid at the auction sale. If there was one individual in the community to whom that liberty should not have been given, who should not have been relieved from the disability attaching to his position, that person was Mr. Coaks. He, and he alone, seems to have had the fullest and most complete information of the circumstances connected with the peculiar property about to be sold. That information would have been most valuable to the Court in adopting the proper expedients to make that property most productive for the benefit of the parties whose interests were under the protection of the Court, and for whom Mr. Coaks was also concerned. I may add that if the result of such an order is to place the trustee, solicitor, or other fiduciary party in the same position as an ordinary purchaser, and subject only to the same obligations and duties to the Court or vendor as if he had been but an ordinary purchaser, then I should say that the making of such an order ought to be rare and exceptional.

The order was however made. It seems to me not to have been a provident order, and that the supposed safeguards which accompanied it, such as that Messrs. Linklater were not to communicate any particulars to Mr. Coaks, were of very small value. Relieved from his disability, Mr. Coaks became master of the position, as the remaining history of the case fully indicates. [His Lordship after discussing the evidence as to the insurances proceeded as follows:—]

The question before your Lordships is not one of law, but of the proper inference to be deduced from the facts in proof; and though I have not come to the conclusion that fraud has been established, yet I cannot avoid saying that on the whole case the

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impression left on my mind is, that Lord Romilly was misled, and was induced to sanction the sale to the defendants at a much lesser price than he would have done had all the facts as to the insurability of the life of E. K. Harvey been submitted to him.

I desire specially to say that I do not mean to impute blame to Mr. Brown. No one on this hearing has done so. I entertain no doubt of his truth and candour, nor that in a very difficult case he performed his onerous duties towards the Court and suitors with care and with honour. He is said to have been at the time a young practitioner, and possibly not sufficiently experienced to cope with Coaks and Bunyon.

I have waded through the 1400 pages of printed matter before us, and with no impression favourable to the defendants; but I am unable to say that fraud has been so established in proof as to justify me in dissenting from your Lordships' expressed opinions. The case must be decided on proof, and not on considerations of mere speculation or impression.

While acquiescing, however, in the judgment, I dissent from that portion of the proposed order which gives costs to the appellants.

Order appealed from reversed. Order of Fry J. restored. The respondents other than the respondents Grant and Hill to pay the appellants' costs in the Court below and the costs of this appeal. Cause remitted to the Chancery Division.

Lords' Journals 22nd February 1886.

Solicitors for appellants: *Smythe & Brettell.*

Solicitors for respondent Grant: *Blake & Heseltine, for Field Son & Pulley, Norwich.*

Solicitor for respondent Hill: *W. Sturt, for I. B. Coaks & Co., Norwich.*

Solicitors for the other respondents: *Whites & Co., for M. S. Emerson, Norwich.*

[HOUSE OF LORDS.]

GUSTAV ADOLPH ABRATH . . . . . APPELLANT;

AND

THE NORTH EASTERN RAILWAY COMPANY . . . . . RESPONDENTS.

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Malicious Prosecution—Reasonable and probable Cause—Honest Belief of Prosecutor—Burden of Proof—Corporation—Action for Malicious Prosecution against Corporation.

In an action against a railway company for malicious prosecution the judge directed the jury that it was for the plaintiff to establish a want of reasonable and probable cause, and malice, and that it lay on him to shew that the defendants had not taken reasonable care to inform themselves of the true facts of the case, and asked the jury whether they were satisfied that the defendants did take reasonable care to inform themselves of the true facts, and that they honestly believed in the case which they laid before the magistrates. The jury answered both questions in the affirmative, and the judge entered judgment for the defendants:—

Held, affirming the decision of the Court of Appeal (11 Q. B. D. 440), that the direction was right, and the judgment rightly entered.

Held, also, by Lord Bramwell, that an action for malicious prosecution does not lie against a corporation aggregate, a corporation aggregate being incapable of malice or motive.

APPEAL from a decision of the Court of Appeal.

The facts are set out in the report of the case before the Court of Appeal (1). For the present purpose the following brief statement will suffice.

One McMann recovered from the respondents a large sum as compensation for personal injuries in respect of a railway collision. Information having been given to the company's directors they caused inquiries to be made by the company's solicitor. The results of those inquiries were laid before counsel, who advised that the appellant, Dr. Abrath, should be prosecuted for conspiring with McMann to defraud the company by falsely pretending that McMann had been injured in the collision and by artificially manufacturing symptoms of injury. The respondents accordingly prosecuted the appellant, who was acquitted. In an action brought by him against the respondents for malicious prosecution Cave J.

(1) 11 Q. B. D. 440.

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directed the jury in substance to the effect mentioned in the head-note. The jury found that the defendants did take reasonable care to inform themselves of the true facts of the case and that they honestly believed in the case which they laid before the magistrates, and Cave J. entered judgment for the defendants. The Divisional Court (Grove and Lopes JJ.) ordered a new trial on the ground of misdirection (1). The Court of Appeal (Brett M.R., and Bowen and Fry L.JJ.) reversed this decision and ordered the judgment of Cave J. to stand (2). From this decision the plaintiff appealed.

March 11, 12, 15. Sir *C. Russell* A.G. and *MacClymont*, (*H. Adkins* with them) for the appellant, contended that there ought to be a new trial: that the findings of the jury were entirely against the evidence: that Cave J. had misdirected the jury in not presenting to the jury the real matters for consideration and the admitted facts: that even if there was at one time an honest belief by the defendants in the case for the prosecution, they had found out the real facts long before the close of the prosecution; that the defendants had caused counts to be inserted in the indictment which they must have known were groundless; that there was abundant evidence of want of reasonable and probable cause and of malice, and that very slight evidence on the part of the plaintiff was enough to throw the onus of proof upon the defendants; and that Cave J. ought to have ruled that there was no reasonable or probable cause. In the course of the discussion the following authorities were referred to:—

Ellis v. *Abrahams* (3); *Reed* v. *Taylor* (4); *FitzJohn* v. *Mackinder* (5); *Sutton* v. *Johnstone* (6); *Henderson* v. *Midland Ry. Co.* (7); *Willans* v. *Taylor* (8); *Lister* v. *Perryman* (9); *Douglas* v. *Corbett* (10).

Digby Seymour Q.C. Sir *Henry James* Q.C. *Gainsford Bruce* Q.C. and *J. Lawson Walton*, for the respondents were not heard.

(1) 11 Q. B. D. 79.
(2) 11 Q. B. D. 440.
(3) 8 Q. B. 709, 713.
(4) 4 Taunt. 616.
(5) 30 L. J. (C.P.) 257, 264.
(6) 1 T. R. 493.
(7) 20 W. R. 23.
(8) 6 Bing. 183, 187; in error, 2 B. & Ad. 845, 857.
(9) Law Rep. 4 H. L. 521.
(10) 6 E. & B. 511.

EARL OF SELBORNE:—

My Lords, the argument of the learned counsel for the appellant has cleared up any difficulty which there might have been as to the real grounds on which we should decide this case. The question really is one of the weight of evidence and nothing else. The burden of satisfying the jury that there was no reasonable and probable ground for the prosecution lies upon the plaintiff. It is not now seriously disputed that it does.

The learned judge having left the two questions of fact to the jury, they found, first, that proper care had been used by the prosecutors to inform themselves of the facts; and, secondly, that the prosecutors honestly believed the case which they laid before the magistrates.

In my judgment the learned judge did not misdirect the jury, and the Court of Appeal were right in their view of the law; and the only question is, is there any ground for saying that upon the weight of evidence the jury miscarried, and that a new trial ought to be directed? Speaking for myself, I cannot imagine a more hopeless case in that point of view. The railway company had to determine whether or not they would institute this prosecution; and the evidence given by the gentleman who was acting for them in the matter is, to my mind, as completely sufficient to negative the idea of the absence of reasonable and proper care on the part of the company to inform themselves of the facts as anything for the purpose of an action of this sort can be.

The statements of certain persons were obtained, carefully considered, and laid before counsel, and counsel advised a prosecution upon those materials. A prosecution having been instituted, it was thought by the magistrates that the preponderance of evidence was such that they ought to send the case for trial. Taking the evidence as it was presented to the railway company, to those who advised them, and to the magistrates, it was a body of evidence which if believed tended to prove the charge, and justified those who believed it in making the charge in perfect good faith. How it can be said that taking such a body of evidence as that, without the suggestion, much less proof, of the use of any fraudulent or improper means to obtain it, shews a want of reasonable care on the part of the company to inform them-

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selves about the facts, I cannot imagine. I cannot conceive better primâ facie evidence of reasonable care in that respect.

[His Lordship then discussed the evidence in detail and concluded thus :—]

So far from thinking that there is a preponderance of evidence against reasonable and probable cause, my doubt is rather on the other side, whether on the whole evidence there was really anything to go to the jury in favour of that conclusion.

I move your Lordships that the order appealed from be affirmed, and the appeal dismissed with costs.

LORD WATSON :—

My Lords, I am of the same opinion. I have no doubt that the learned judge rightly directed the jury, and that there is nothing to shew that the defendants acted without reasonable and probable cause. The authorities cited by Mr. MacClymont in the course of his able argument do not form, in my opinion, any exception to the ordinary rule that the burden of proof lies upon the plaintiff. Some of them establish that a slight amount of evidence may be sufficient to launch the plaintiff's case when the whole circumstances of the case are in themselves sufficient to raise a presumption of want of reasonable care on the part of the prosecutor, but that is not the case here.

As to the finding of the jury being contrary to the evidence, I concur in the observations which have been made by the noble and learned Earl. I entertain considerable doubt whether there was any evidence to go to the jury. It is unnecessary to determine that point, but of this I feel persuaded from the argument which we have heard, that looking at the evidence which was before the jury they could not honestly and fairly have given any other verdict.

LORD BRAMWELL :—

My Lords, I am of opinion that no action for a malicious prosecution will lie against a corporation. I take this opportunity of saying that as directly and peremptorily as I possibly can; and I think the reasoning is demonstrative. To maintain an action for a malicious prosecution it must be shewn that there was an

absence of reasonable and probable cause, and that there was malice or some indirect and illegitimate motive in the prosecutor. A corporation is incapable of malice or of motive. If the whole body of shareholders were to meet and in so many words to say, "prosecute so and so, not because we believe him guilty, but because it will be for our interest to do it," no action would lie against the corporation, though it would lie against the shareholders who had given such an unbecoming order. If the directors even, by resolution at their board or by order under the common seal of the company, (I am putting the case plainly in order that there may be no mistake about it,) were maliciously, with the view of putting down a solicitor who had assisted others to get damages against them, to order a prosecution against that man, if they did it from an indirect or improper motive no action would lie against the corporation, because the act on the part of the directors would be ultra vires; they would have no authority to do it. They are only agents of the company; the company acts by them, and they have no authority to bind the company by ordering a malicious prosecution.

I say, therefore, that no action lies, even if you assume the strongest case, namely, that of the very shareholders directing it or the very directors ordering it, because it is impossible that a corporation can have malice or motive; and it is perfectly immaterial that some subordinate officer or individual or individuals of the company have such malice or motive. In the case which I put an action would lie against the directors personally who had ordered an improper prosecution. It may be that no action would lie against any subordinate who had malice and who had not ordered or caused or procured the prosecution; because although the two ingredients existed which are necessary for the maintenance of such an action, that is to say, malice and the absence of reasonable and probable cause, yet in the case which I surmise the man would not be a prosecutor; and unless you find the absence of reasonable and probable cause and malice in him who is the prosecutor an action is not maintainable. It is not enough, therefore, to shew that there was an absence of reasonable and probable cause, and that the subordinate had malice, not that I for a moment suggest that that is the case here.

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In my opinion this is not merely what is commonly called a technical point—although if a point were untechnical it would be very objectionable. This is a substantial objection; because every one, or every counsel and solicitor listening to me, knows that the only reason why a railway company is selected for an action of this sort is that a jury would be more likely to give a verdict against a company than against an individual. Everybody knows it; and perhaps there is a sort of hope of confusion; it is said "the man was innocent; somebody ought to be punished for it; here is a railway company; there was an improper motive;" and so there is a jumble; the case gets before a jury, and a railway company is exactly the party to have damages awarded against it. If ever there was a necessity for protecting persons it is in an action for malicious prosecution, and for two reasons. First of all a prosecutor is a very useful person to the community. We have something in the nature of a public prosecutor, but everybody knows that the greater number of prosecutions in this country are undertaken not by the state but by private persons, or, as in this case, corporations.

One may venture to quote Bentham even upon this matter. He said that laws would be of very little use if there were no informers, and that it is necessary for the benefit of the public that people when they prosecute, and prosecute duly, should be protected. And there is an additional reason. A man brings an action for a malicious prosecution; he gives evidence which shews or goes to shew that he is innocent. You may tell the jury over and over again that that is not the question, but they never or very rarely can be got to understand it. They think that it is not right that a man should be prosecuted when he is innocent, and in the end they pay him for it. It is, therefore, all-important that these actions should not be permitted to be brought against persons or bodies or others who are not properly liable in respect of them.

It may be said, "Well, but this is rather hard upon a man who has been prosecuted and improperly prosecuted." That is to say the corporation is innocent but its officers are guilty. But the same thing happens in the case of an individual prosecutor. A man receives false information; he prosecutes upon that

information. The person who gave him the information is not liable, because he did not prosecute. He may be liable for the untrue statement, because it may be slander, in the same way as he would be liable if he charged an indictable offence against a person; or possibly he may be liable for having procured the prosecution; and it may be that in such a case as this some of the people employed by the company were actuated by an indirect motive. I do not say that they were—it is impossible to say so; but what I say is that it is no harder upon a man that he has no remedy against a public company who has prosecuted him when the servants of the company have been malicious, than it is that there is no remedy against any individual man who has prosecuted, he having no malice but somebody who gave him information having malice.

It is said that this is an old-fashioned sort of notion. It is; but this opinion is one that I have entertained ever since I have known anything about the law; and although it is an old-fashioned one, I trust that it is one which will not die out, for the reasons which I have given.

But it is said "Well, but a variety of actions have been allowed against corporations which did not formerly exist." I deny it. It is certain that a corporation may order a thing to be done which is a trespass, because there the act of those who act for the corporation is not ultra vires. For instance, take the case of false imprisonment. A railway company gives somebody power to take up persons who it believes are doing some wrong to the company. If a person is so authorized, that is an authority which may be unreasonably exercised. You cannot give an authority maliciously to prosecute, but you may give an authority to take up persons who are cheating a railway company. If that person to whom authority is given makes a mistake and takes up a person who is not cheating, it may in such a case be said properly to be the act of the company and they are properly liable. But in that case there is neither malice nor motive in question. So also they may be liable for the publication of a libel. That unfortunate word "malice" has got into cases of actions for libel. We all know that a man may be the

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publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable although he had not a particle of malice against the man. So would a corporation. Suppose that a corporation published a newspaper, or printed books, and suppose that it was proved against them that a book so published had been read by an officer of the corporation in order to see whether it should be published or not, and that it contained a libel; an action lies there, because there is no question of actual malice or ill will or motive.

For these reasons, which I dwell upon at no greater length, more particularly as Mr. MacClymont did not cite any cases upon this point, or go into it at all, I am clearly of opinion that this action does not lie against this company.

But assuming that that difficulty did not exist, there is no absence of reasonable and probable cause in this case. I doubt very much whether Cave J. needed to have left to the jury the question whether reasonable care had been used. I doubt it very much indeed. I doubt very much whether he might not —I will not say ought not—have said to the jury "If you are of opinion that these directors honestly believed the statements that were laid before them, and honestly acted upon the opinions that were given to them, there not only was no absence of reasonable and probable cause but it existed in abundance." However, he did put the question, and the jury did answer it; and it does seem to me, I must say, to be one of the strongest cases of an unfounded action that ever was brought, even for a malicious prosecution.

LORD FITZGERALD:—

My Lords, I do not intend to make any observation upon the grave question on which my noble and learned friend (Lord Bramwell) has expressed his opinion so forcibly, as to whether this action lies against a corporation. That question is not now

properly before us. We have had no argument upon it, and in the view which your Lordships have taken it is unnecessary for the decision of the case. I have no doubt that the weighty observations of my noble and learned friend will be instructive in future, and will always carry with them that force before any tribunal which they so eminently deserve. But I shall only say of corporations, and of these trading corporations especially, that I have often heard it observed that they certainly are very frequently without conscience, and sometimes very malicious.

To deal with the case as it really comes before us, I do not entertain any doubt that the issue upon the question of probable cause as well as upon the question of malice lies upon the plaintiff, in this sense, that the plaintiff is bound to offer evidence sufficient, if uncontradicted, to sustain both these issues on his behalf. At the close of the plaintiff's case, supposing it had closed there, and no evidence had been offered directly on behalf of the defendants, was there such a case upon the two issues as that it could be said that there was evidence to sustain the issues for the plaintiff? I so far differ from the opinion of my noble and learned friend that I think there was evidence upon both issues, if uncontroverted, from which the jury might have found, and the judge who presided, drawing the proper inference from the facts himself, might have found in the plaintiff's favour. It is unnecessary for me here to point out in detail what that evidence was. But upon the whole of the evidence produced on both sides the learned judge put two questions—and, in my opinion, two very proper questions—to the jury for the purpose of informing his mind as to what was the proper inference for the judge to draw upon this very question of the presence or absence of probable cause.

The jury answered the two questions in the defendants' favour, and though possibly I might myself have come to a different conclusion upon the first question, I cannot say that the verdict was an unreasonable one, or so far against the weight of evidence that it ought not to stand.

As to the alleged misdirection, I do not think that the summing-up of the learned judge, taken as a whole, and together with the questions he put, could have misled the jury.

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EARL OF SELBORNE :—

My Lords, my noble and learned friend opposite (Lord Bramwell) has raised a question which has not been argued before your Lordships, a question of the greatest importance, as to whether it is of the essence of an action of this sort that malice should be proved in a sense not imputable to a corporation. The importance of that question would certainly have led me, before I could arrive satisfactorily at an opinion of my own upon it, to desire to hear it argued. It has not been argued at your Lordships' Bar. It was not, as far as I can see, a ground of decision in the Court below. What has been said by my noble and learned friend, I am sure, will have the weight due to all opinions of his whenever the question comes to be solemnly examined; but I do not think that your Lordships' decision in the present case can properly be regarded as determining that question.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 15th March 1886.

Solicitor for appellants: *J. Balfour Allan*, for *W. M. Skinner, Sunderland.*

Solicitors for respondents: *Williamson, Hill, & Co.*, for *G. S. Gibb, York.*

[HOUSE OF LORDS.]

JULIA BARLOW AND FREDERICK LAST APPELLANTS;

AND

THE VESTRY OF THE PARISH OF ST. MARY ABBOTTS KENSINGTON AND WILLIAM ELSDON . . . . . RESPONDENTS.

H. L. (E.) 1886 March 26.

Metropolis Management Acts—Metropolis Management Amendment Act 1862 (25 & 26 *Vict. c.* 102) *ss.* 74, 75—*General Line of Buildings—Certificate of Superintending Architect—House at Corner of two Streets—Order of Magistrate—Reduction into writing—Time of Service.*

The appellants' house was built at the corner of the K. Road and a new street called D. Gardens. The side of the house abutting on the eastern side of D. Gardens projected beyond a row of houses on that side of D. Gardens. Under sect. 75 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) the superintending architect to the Metropolitan Board of Works gave a certificate that the main fronts of that row of houses was the general line of buildings on the eastern side of D. Gardens, but did not decide that that was the general line of buildings, either of the row of houses or of the street in which the appellants' house was situate:—

Held, reversing the decision of the Court of Appeal, that no offence under sect. 75 had been committed by the building of the appellants' house, and that there was no jurisdiction for a magistrate's order under that section directing the demolition of the projecting part of the house.

A magistrate made a verbal order under sect. 75 directing the builder to demolish part of a house within eight weeks. The builder was present when the order was made, but it was not reduced into writing till the day when the eight weeks expired; after that day a copy was served upon him or came to his knowledge:—

Held, reversing the decision of the Court of Appeal, that the order was not "an order in writing made on" the builder within the meaning of sect. 75, and was therefore invalid.

APPEAL from a decision of the Court of Appeal (Baggallay, Cotton and Lindley L.JJ.) reversing the decision of Bacon V.C. The facts are set out in the report of the case below (1) and in the judgment of Lord Herschell L.C. in this House.

(1) 27 Ch. D. 362. That report states that the magistrate's order was served on the respondent Elsdon, the builder, on the 21st of March (the last day of the eight weeks mentioned in the order) or the 22nd. In fact (as appears from the judgments of Lord Herschell L.C. and Lord Watson) the original never was served upon or shewn to Elsdon: but a copy was served upon him or came to his knowledge on the 22nd of March.

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Feb. 11, 12. *Rigby* Q.C. and *B. B. Rogers* for the appellants:—

Difficult questions may no doubt arise upon the construction of sect. 75 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), but it is not necessary to discuss them here. It is enough to say that sect. 75 applies only to the case where the ground built upon was formerly vacant, and not to a case like the present where the house in question is a new building on ground formerly built on: *Lord Auckland* v. *Westminster Local Board of Works* (1). But whether that be so or not, the present case may be determined upon the certificate of the architect. In order to justify a conviction under sect. 75 the architect must decide the general line of buildings in the street or row of houses in which the building in question is situate; and the architect's certificate is conclusive: *Spackman* v. *Plumstead Board of Works* (2). Here the architect has decided only the general line of buildings in De Vere Gardens, and (upon the true construction) the certificate and plan find that the appellants' house is in Kensington Road and not in De Vere Gardens. If however this be not the true construction, then it is for this House to determine where the building is situate, and upon the facts it is clearly in Kensington Road. At all events it is manifestly not one of "the row of houses" in De Vere Gardens with which alone the certificate deals. If the respondents were right the consequences would be very startling; for when a corner house was pulled down and rebuilt the architect could compel the builder to set it back so as to expose to view in the small side street "the general line" of cottages or stables or whatever may be the buildings in the side street.

The object of the Act was to provide for uniformity in London streets. Where a corner house has its principal entrance in a main road and its flank in a side street as here, the only general line to which it need conform is that of the main road.

Further, the order, not having been put into writing nor served till the day of the expiry of the eight weeks named in the order, was not an "order in writing made on" the owner within the meaning of sect. 75.

(1) Law Rep. 7 Ch. 597, 604. (2) 10 App. Cas. 229.

Sir *R. Webster* Q.C. and *Millar* Q.C. (*Ingle Joyce* with them) for the respondents:—

The house is in De Vere Gardens and projects beyond that line which the architect has decided to be the general line of buildings in De Vere Gardens. The house may also be in Kensington Road, but that does not affect this question. The real question is whether those who live in De Vere Gardens have anything to say to the line of building so far as this house is concerned.

Lord Auckland v. *Westminster Local Board of Works* (1) only decides that sect. 75 does not apply where the house occupies the site of old buildings *with reference to the street in question*. But here there was no street where De Vere Gardens now are. That case therefore does not apply here. This is not "vacant ground" in the sense used in that case. Here a man clears a whole site and begins de novo: certainly a case intended to be dealt with by sect. 75. It is impossible to suppose that whenever a rookery is pulled down and a new street made sect. 75 has no application.

The certificate does not bear the construction contended for by the appellants, but if it does the answer is that it is no part of the architect's duty to determine in what street a house is: that is for the magistrate to determine. *Spackman* v. *Plumstead Board of Works* (2) did not decide that the certificate is conclusive as to whether the house is in a particular street or row of houses or not. As to the form of the injunction, at all events the appellants are not entitled to an unlimited injunction, for they may go again to a magistrate and get a good order. At the most the appellants are entitled to restrain them from proceeding on this order.

As to the second point, the order was made while the builder was present; it cannot therefore now be contended that the order is bad.

Rigby Q.C. replied.

The House took time for consideration.

(1) Law Rep. 7 Ch. 597. (2) 10 App. Cas. 229.

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BARLOW v. VESTRY OF ST. MARY ABBOTTS, KENSINGTON.

March 26. LORD HERSCHELL L.C.:—

My Lords, this is an action which is now being prosecuted by the appellants, as the legal personal representatives of Charles Edward Barlow, the original plaintiff, to restrain the respondents from proceeding to demolish a part of a dwelling-house belonging to them, situate within the metropolis. The respondents do not deny that they threaten such demolition, but they claim the right to demolish the building under the provisions of the 75th section of the Metropolis Management Amendment Act 1862.

The house in question is situate at the corner of Kensington Road (a street which has long existed) and a new street which has been formed at right angles to it, called De Vere Gardens. The site upon which this and the adjoining houses in the Kensington Road were erected was the property of Charles Edward Barlow, and was by him sold to the respondent William Elsdon under an agreement of the 2nd of August 1881, the arrangement being that William Elsdon should raise a part of the purchase-money by a first mortgage, and, subject to this, give Charles Edward Barlow a second mortgage on the premises to secure £5000 and interest. This arrangement was carried out by an indenture of mortgage of the 22nd of November 1881, under which Charles Edward Barlow entered into possession of the premises and remained in possession until the time of his death, whilst this action was pending. The side of the house facing the new highway was built by William Elsdon up to the pavement. The houses which were at that time built on the eastern side of De Vere Gardens had an area seven feet wide (except so far as the same were overhung by bay windows and porticoes) between them and the pavement.

Under these circumstances the surveyor to the respondents contended that no part of the appellants' house facing De Vere Gardens ought to have been built within seven feet of the pavement. He accordingly took proceedings under sect. 75 of the Metropolis Management Amendment Act 1862. That section enacts "that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate, in case the distance of

such line of buildings from the highway does not exceed fifty feet or within fifty feet of the highway when the distance from the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent, or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish, or the board of works for the district in which such building or erection is situate, to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable."

The respondents' surveyor first applied to Mr. Vulliamy, the superintending architect to the Metropolitan Board of Works, and requested him to decide the general line of buildings on the east side of De Vere Gardens. Mr. Vulliamy gave a certificate which, after reciting a portion of the section I have just quoted, proceeds as follows:—"And whereas Mr. William Weaver, surveyor to the vestry of Kensington, and Mr. William Elsdon, of Victoria Road, Kensington, have severally appeared before me and been heard regarding the erection of a house in Kensington Road, at the corner of De Vere Gardens, and beyond the face or front of the buildings forming a row of houses on the eastern side of De Vere Gardens aforesaid, and I have been required to decide the general line of buildings in such gardens as provided in the said statute: Now, therefore, having considered the several

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matters, I, the undersigned, being the superintending architect to the Metropolitan Board of Works, do hereby, pursuant to the said Act, decide that the main fronts of the buildings forming the row of houses aforesaid, and tinted pink on the plan hereto annexed and signed by me, is the general line of buildings on the eastern side of De Vere Gardens aforesaid."

To this certificate there was attached a plan in which a pink line was drawn along the front of the main wall of the houses on the eastern side of De Vere Gardens, which commenced at the southern end of the houses and terminated at the last of the houses then built, which was a point upwards of fifty feet to the south of the appellants' building.

The next step taken was to make a complaint before Mr. Sheil, one of the magistrates of the metropolitan police courts, and on the 24th of January 1882 he made a verbal order directing the respondent Elsdon to demolish the seven feet in question within a period of eight weeks from the 24th of January 1882. The order was not reduced into writing until the 21st of March 1882, after which date a copy of it was served on the respondent Elsdon.

On the 2nd of March 1882 the writ in the present action was issued claiming an injunction to prevent the defendants from pulling down or interfering with any part of the house. The action came on for trial before Bacon V.C., who granted a perpetual injunction in the terms of the writ. This judgment was reversed by the Court of Appeal, who made an order dismissing the action.

It appears to me that the question whether this action is well founded depends entirely upon whether the respondents are able to establish that by reason of the provisions of sect. 75 of the Metropolis Management Amendment Act 1862, and the proceedings which have been taken under it, they would be justified in demolishing that portion of the appellants' building which has given rise to this controversy.

The construction of the section I have just referred to, and the functions under it of the superintending architect to the Metropolitan Board of Works and the magistrate, came recently under the consideration of your Lordships' House in the case of *Spack-*

man v. *Plumstead Board of Works* (1). It was there held that the offence created by the statute consisted in building beyond the line fixed by the superintending architect to the Board of Works as the general line of buildings in the street or row of houses in which the building in question was situate, and to which it was therefore bound to conform. It was decided that the magistrate's duty was confined to seeing whether the building projected beyond the line so decided, and that he was not empowered himself to inquire or determine what was the general line of buildings.

In that case it was manifestly considered by their Lordships, and I think rightly, that a building may be situate in a row of houses and bound to conform to the general building line of such row of houses, though that is not the general building line of the street, and further, that the general building line may differ in different parts of the same street, and that it is for the superintending architect to determine "the extent of the space along which a line is to be laid down" (2) in deciding what is the general line of buildings at any part of the street.

Now in the present case the language of the architect's certificate is somewhat peculiar. It appears clear that he did not determine or intend to determine that the building in question was situate in the row of houses on the eastern side of De Vere Gardens, for he describes the house as "in Kensington Road, at the corner of De Vere Gardens, and beyond the face or front of the buildings forming a row of houses on the eastern side of De Vere Gardens." And all that he decides is that the main fronts of the buildings forming that row of houses "is the general line of buildings on the eastern side of De Vere Gardens."

I think, therefore, that the architect has not decided that the line he has drawn on the plan is the general line of buildings, either of the row of houses or the street in which the building of the plaintiffs is situate, unless it can be said as matter of law that where a row of houses has been erected along a portion of a highway any building abutting upon the same highway, whatever the interval between it and the row of houses built, and whatever the other circumstances, necessarily forms part of the same row

(1) 10 App. Cas. 229.

(2) 10 App. Cas. 243.

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of houses, or is to be regarded as necessarily governed by and bound to conform to the general line of building of such row of houses. It seems to me that your Lordships cannot so hold as matter of law. I think that such a construction of the section would run counter to the views expressed by this House in the case of *Spackman* v. *Plumstead Board of Works* (1). And I do not think it would be a reasonable construction of the section. Various cases were suggested in the course of the argument which shewed the unreasonable consequences which would flow from such a construction and the injustice which it might work, where a new street is created leading out of an existing one. The owner of land abutting on the new street at the other end from the existing street, and however distant from it, might by erecting a few houses, or it may be a single house, compel the owner of the land at the corner of the two streets so to set back his building as to deprive him of his building site altogether. For in such a case the architect might give a precisely similar certificate to that which he has given in the present case, and, indeed, could hardly avoid doing so, if he gave a certificate at all.

I have therefore come to the conclusion that the respondents have not established that any offence has been committed under the 75th section by the erection of the building of which the respondents complain.

I do not intend to say that a building situate at the corner of two streets can never, for the purposes of the section, be regarded as situate in both, or that it cannot in such a case ever be regarded as situate in two rows of houses. Such a question must in each case be decided upon its own merits, having regard to all the circumstances.

In the view I have taken it is unnecessary to determine whether if the offence had been established the injunction ought, nevertheless, to have been granted, on the ground that the magistrate had not made such an order as is required by the statute. But I must not be understood as expressing an opinion that the order was a valid one.

It follows from the conclusion at which I have arrived that in

(1) 10 App. Cas. 229.

my opinion the judgment of the Court of Appeal cannot be supported. I therefore move your Lordships that the judgment of the Court of Appeal be reversed, and the judgment of Bacon V.-C. restored, with the variation that the injunction should be limited to restraining the respondents from demolishing or interfering with the buildings in question, or taking any steps for that purpose, in virtue either of the certificate of Mr. Vulliamy or of the complaint and proceedings following thereon, and that the respondents, the vestry of St. Mary Abbotts Kensington, do pay the costs in the Court of Appeal and the costs of this appeal.

LORD WATSON:—

My Lords, I think it is a necessary consequence of the judgment of this House in *Spackman* v. *Plumstead Board of Works* (1) that until the superintending architect of the Metropolitan Board has decided the matters committed to him by sect. 75 of the Metropolis Management Amendment Act 1862, no justice of the peace has jurisdiction to entertain a complaint under that section, and to issue an order in terms thereof, directing the demolition of a building or erection. And in my opinion the function assigned to the superintending architect is, not merely to lay down the general line of buildings in a street, place, or row of houses in which the building or erection complained of is alleged to be situated, but to fix and determine the general building line of the street, place, or row in which, according to his professional judgment, such building or erection is actually situate. The question whether a building is or is not within the meaning of the Act situate in a particular street, place, or row may involve considerations of the same character with those upon which the determination of a general line of buildings must often depend; and it appears to me to have been the intention of the legislature to entrust the decision of both points to the architect, and not to the justice before whom the complaint is brought.

The certificate of Mr. Vulliamy, dated the 18th of October 1881, and the plan therein referred to, which must be construed together, do not appear to me to meet the requirements of sect. 75,

(1) 10 App. Cas. 229.

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inasmuch as they do not contain any decision by that gentleman to the effect that the building in dispute, or any part of it, projects beyond the general building line of the street or row in which it is situate. They do indicate that the building is "in Kensington Road at the corner of De Vere Gardens," that the main fronts of a row of houses on the east side of the gardens constitute the general building line of that side of De Vere Gardens, and that the building is beyond the main fronts of that row of houses. But they do not shew that, according to the judgment of Mr. Vulliamy, the building is situate either in that row of houses or in De Vere Gardens. I am therefore of opinion that the magistrate had no jurisdiction to pronounce the order of demolition which, ex facie, bears date the 24th of January 1882, and that it must be treated as a nullity.

I also think that, even if there had been jurisdiction in the magistrate, his order would, in the circumstances of this case, have been void. Sect. 75 prescribes that such order shall be made "in writing on" the person who is directed to take the building down, and that for the purpose of demolition he shall be allowed "such time as such justice shall consider reasonable." The order professes to allow for that purpose a period of eight weeks from the 24th of January, which consequently expired on the 21st of March 1882. But it is admitted that, although the magistrate announced the terms of his judgment on the 24th of January, the order itself was not reduced to writing or subscribed by him until the 21st of March following. It was never served upon the person to whom it is directed; and the fact of a written order having been made did not come to his knowledge before the expiry of the day upon which it was issued. I am of opinion that an order verbally intimated by the magistrate is not in any sense an order "in writing" within the meaning of the Act; and further, that in proceedings like these of a harsh and penal character a written order cannot be regarded as made "on" the defendant until it has been duly served upon him or otherwise brought to his knowledge. In that view no time whatever was allowed for implementing the order to demolish; and that circumstance of itself would be sufficient to vitiate the order, even if the rest of the proceedings had been regular and competent.

Other important questions have been argued before us arising upon the construction of sect. 75, but these I do not think it necessary to decide. If the views which I have already expressed are well founded, the respondents are not at present in a position to institute a complaint in terms of sect. 75, and it is possible that they may never be able to place themselves in that position.

I am accordingly of opinion that your Lordships ought to reverse the order appealed from and to restore the judgment of the Vice-Chancellor with the variations which have been proposed by my noble and learned friend.

LORD BRAMWELL:—

My Lords, I agree generally in the reasons that have been given by my noble and learned friends for reversing the judgment in this case. I arrived at the same conclusion on other reasons. My reasons are, that I am of opinion that sect. 75 only applies to buildings in a row of houses, or buildings in a line of buildings, and that the building in question was not in such a row of houses or line of buildings in De Vere Gardens. I construe the statute as I do for the following reasons. Sect. 75 uses the words "street, place, or row of houses." This evidently means that a *row* of houses is to be looked for, that though there may be a general line of buildings in a street, yet if there is a row of houses not in that general line, the building is not to be beyond the line of the row, though within the line of the street. Great Cumberland Place affords an illustration of what I mean. It may be said that there is a general line of buildings in Great Cumberland Place; I think there is. But there is another and different one for the row of houses in the recess in it. No houses could be projected beyond the line of this row. Again, there may be said in a sense to be a general line of buildings in the Strand on the north side. There is not there a recess or projection from Charing Cross till Holywell Street is reached. It would be correct to say that that shewed the general line of buildings in the Strand. But, doubtless, if a house in the Strand east of St. Mary's Church was pulled down it might be rebuilt out to its present extent without being subject to the consequences attaching by sect. 74 to the rebuilding of houses which project

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"beyond the general line of the street." Then the good sense of the thing requires this construction, whatever we may suppose the motive of the enactment, whether the convenience of neighbours, their amenities, sanitation, or what not.

Next I find, as a fact, that the appellants' house is not in the row of houses or line of buildings called De Vere Gardens; I do not say it is not in De Vere Gardens. If houses are in streets at all, and not by the side of them only, a corner house is in two streets. I think there was nothing in the suggestion I made that the road by the side of the house was not a part of but a road leading to De Vere Gardens. I think that if the builder of the appellants' house had chosen to have built it as part of the row of houses there, he must have built it in their line. But he did not. If I am asked to define what is a building which is built as part of a row, I answer at once that I cannot. The particular case must be examined. But I can give an example that I think cannot be denied. Suppose a row of small houses in a side street and a row of palaces in the main street. Could it be said that one of the latter was in the same row as the former? I remember what Mr. Millar said, that the statute says nothing about uniformity of elevation, or requires anything but uniformity of frontage. But still I say that in the case I put the palace is not in a row with the cottages. I do not say that it depends on one street being the main street or the other not. Nor do I attach value to the entrance being in the side of the house where the row is, except in so far as it helps to shew whether it is in that row or not. Further, it must be admitted, I think, that if another house like the one in question were built to the south of it, it must be built not projecting beyond the row of houses called De Vere Gardens. It would then be in their row. This is not. See what would be the consequence of holding that it is. Here is the case I put. A man buys land at the back of Nos. 98, 99, 100, 101, and 102. He pulls down 100 and makes a way to his land, on which he builds houses behind 98 and 102. Suppose the owner of 99 pulls down his house, could he, by virtue of sect. 74, be made to set it back to the level of the new houses at the back? Further, though builders in a row may affect subsequent builders in the same row, I cannot think they

can where the frontage is different. I lay down no general rule. I do not think it possible to do so accurately; but I hold, as a fact, that the appellants' house is not within any row or line of buildings in De Vere Gardens. It is said that the question I have dealt with is for the architect. I think not, or I should not have written as I have. When a house is in a row of houses it is for the architect to decide what is the "general line of the buildings." But I think if he puts a house in a row in which it is not, he exceeds his jurisdiction. But if it is for the architect to determine this matter, then it is clear that Mr. Vulliamy has not decided it in favour of the respondents. On the contrary, he has shewn that his opinion on the question is the same as that which I have expressed, viz., that the house in question is not in the row of houses to the south of it.

LORD FITZGERALD:—

My Lords, I have had the advantage of reading the judgment which has been delivered by the noble and learned Lord on the woolsack, and also the judgment which has been delivered by my noble and learned friend opposite (Lord Watson), and I entirely agree in the conclusions at which they have arrived and in their reasoning. I especially wish to advert to and express my agreement with the judgment of my noble and learned friend opposite, indicating that the order on which it was intended to proceed to demolish the house in question was absolutely void and valueless. I adhere to what was said and done in *Spackman* v. *Plumstead Board of Works* (1), in which I took part.

LORD HALSBURY:—

My Lords, I concur.

Order of the Court of Appeal reversed; judgment of Bacon V.C. restored, with the variation that the injunction therein granted should be limited to restraining the respondents, the Kensington Vestry, from demolishing or interfering with the buildings in question or taking any steps for that purpose

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in virtue either of the certificate of Mr. Vulliamy or of the complaint and proceedings following thereon; the respondents, the Kensington Vestry, to pay the costs in the Court of Appeal and the costs of this appeal. Cause remitted to the Chancery Division.

Lords' Journals 26th March 1886.

Solicitors for appellants: *Last & Son.*
Solicitors for respondents: *Pontifex, Hewitt & Pitt.*

[HOUSE OF LORDS.]

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April 5.

C. & C. J. NORTHCOTE . . . . . APPELLANTS;

AND

THE OWNERS OF THE HENRICH BJÖRN RESPONDENTS.

THE HENRICH BJÖRN.

Ship—Admiralty—Necessaries supplied to Foreign Vessel in English Port—Material Man—Jurisdiction of Admiralty Court—Foreign Vessel—Maritime Lien—Action in rem—3 & 4 *Vict. c.* 65 *s.* 6—24 *Vict. c.* 10 *s.* 5.

The stat. 3 & 4 Vict. c. 65 s. 6 does not give a maritime lien in respect of necessaries supplied to a foreign ship in an English port.

The plaintiffs advanced to the part-owner of a foreign ship then at Liverpool money for necessaries for the ship. The part-owner having sold his interest in the ship to the defendants the plaintiffs brought an action in rem for the amount of the advances:—

Held, affirming the decision of the Court of Appeal (10 P. D. 44), that the action could not be maintained.

APPEAL from a decision of the Court of Appeal (1).

In March 1882 the *Henrich Björn*, a Norwegian vessel, of which Abrahamsen then owned five-sixths, was lying at Liverpool, and under a written agreement (which is set out in the report below (1)) the appellants, London shipbrokers, advanced a sum of money to Abrahamsen for necessaries for the vessel. Abra-

(1) Reported as "*The Heinrich Bjorn*," 10 P. D. 44.

hamsen having gone into liquidation the defendants bought his five-sixths share.

The appellants afterwards brought this action in rem, claiming the amount of their advances. Sir J. Hannen decreed in favour of part of the plaintiffs' claim, with a reference to the Registrar to report the amount due (1). The Court of Appeal (Brett M.R. Bowen and Fry L.JJ.) reversed this decision, and dismissed the defendants and their bail from the action (2). From this judgment the plaintiffs appealed. The only question raised by the present appeal was whether the plaintiffs had a maritime lien for the advances.

Feb. 23, 25, 26. *Cohen* Q.C., and *F. W. Raikes*, for the appellants:—

The question is whether (as the appellants contend) the legislature in 1840 by 3 & 4 Vict. c. 65 gave a maritime lien in respect of necessaries supplied to a foreign ship within the body of a county. There is no doubt that whatever decisions were given on it for some few years after it came into operation, there has been a uniform and unbroken practice for the last twenty-three years. It is true that decisions may be cited either way between 1840 and 1861, when the second Act was passed, but it has since then been considered as settled by *The Ella A. Clark* (3), that the Act of 1840 did confer a maritime lien for necessaries supplied to a foreign vessel in an English port, and that 24 Vict. c. 10, whilst giving the jurisdiction to the Court of Admiralty which was given by sect. 5, did not confer a maritime lien: *The Two Ellens* (4). Since those cases there have been numerous instances in the Court of Admiralty which, however, being in accordance with the law as laid down in those cases, are not reported. So well recognised was the law on this point that the respondents, when defendants in the first instance, did not even raise the question of there being no maritime lien, and therefore no claim against subsequent purchasers, and, indeed, by paying money into court, they admit the validity of the claim in law but only dispute its amount, and on that principle the judgment

(1) 8 P. D. 151.
(2) 10 P. D. 44.
(3) Br. & L. 32.
(4) Law Rep. 4 P. C. 161.

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of Sir J. Hannen is based. The question of whether or no the Act of 1840 confers a maritime lien was first raised by the Court itself when the case came before the Court of Appeal and was then directed to be argued.

As to the statute, 3 & 4 Vict. c. 65 s. 6 deals with four descriptions of claims, salvage, damage, towage, and necessaries supplied to any foreign ship, and its effect is to extend the jurisdiction previously belonging to the Court of Admiralty over these matters when the claim arose on the high seas to similar claims when they arose within the body of a county, or perhaps rather to revive an ancient jurisdiction. All of these claims prior to the statute had conferred a maritime lien, and the ordinary process of the Court was to enforce that lien. As to salvage and damage, this is altogether beyond dispute. Towage, in the form in which it is now understood, was only with the introduction of steam just coming into use, as distinguishable from salvage, but since the statute it has been invariably held to confer a lien: *The Constancia* (1); *The Benares* (2); *The St. Lawrence* (3). As to necessaries, though naturally the cases of such being supplied on the high seas are rare, yet beyond a doubt when so supplied the Court of Admiralty had jurisdiction over them (27 Hen. 8 c. 4 s. 4; 28 Hen. 8 c. 15 s. 4), as over all contracts made on the high seas: *Godfrey's Case* (4); Co. Rep. "Admiralty" part 12 p. 79; *Palmer* v. *Pope* (5); Comyns' Dig. "Admiralty" E. 10; 2 Brown Civ. and Adm. Law 72, and cases there cited. The Court of Admiralty proceeding according to the civil law, except where restrained by statute or prohibition, a privilege against or lien upon the ship attached as soon as necessaries were supplied: Domat on Civil Law part I. book III. tit. 1 sect. v. art. 6 (ed. by Cushing, Boston 1861, vol. i. p. 683 § 1741), and where it was not prohibited this lien was enforced in the ordinary way. Of this there are instances in the reign of Queen Elizabeth, even where the cause arose in the body of a county (Exton's Maritime Dicæologie 373, 377). Before 3 & 4 Vict. the Court had no jurisdiction in any cases except such as conferred a maritime lien

(1) 4 Notes of Cas. 512.
(2) 7 Notes of Cas. Supp. 50.
(3) 5 P. D. 250.
(4) Latch. 11.
(5) Hob. 79, 212.

or involved a right in the ship itself, and therefore when that jurisdiction was extended, there being no express words as to how it was to be exercised, it must be presumed that the extended jurisdiction was to be exercised in the same way and was to confer the same rights as the limited jurisdiction. If this is not so, then "damage" and "salvage" in the body of a county confer no maritime lien, and a vessel which has run down and sunk another in the Thames may proceed on her voyage, and after changing hands abroad return to this country, free of all liability. But that, since the statute, "damage" in the body of a county does confer a maritime lien, is shewn by the case of *The Bold Buccleugh* (1). Previous to 24 Vict. c. 10 s. 10, neither master nor seaman had a maritime lien for wages earned under a special contract. Nor had a master such a lien for his disbursements; but that enactment has been held to give them the same rights in respect of those matters as the seamen had under the general maritime law, and the master had obtained for his wages under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) s. 191, when there was no special contract; see *The Mary Ann* (2).

The United States Courts, which adopted our Admiralty procedure, but which from the constitution of the States have exercised it free from fear of prohibition, have always interpreted the law as giving a maritime lien for necessaries supplied. There is a consensus of opinion in the text-books on this subject, and that this is not confined to cases where the necessaries are supplied to a master but includes those where they are supplied to the owner is shewn by the cases cited in the argument before the Court below (3). That the subsequent Act, 24 Vict. c. 10, has been held not to confer a maritime lien in the case of necessaries supplied to a British ship (*The Two Ellens* (4)) in no way invalidates the proposition that the former statute does, first, because an earlier statute cannot be interpreted by a later one, except by express words; and, secondly, because the later statute does state how the jurisdiction conferred by it, and which in many respects was a new as distinguished from an extended jurisdiction, was to be exercised. It may be that no lien was given by the Act of

(1) 3 Wm. Rob. 220; 7 Moo. P. C. 267.
(2) Law Rep. 1 A. & E. 8.
(3) 10 P. D. 47.
(4) Law Rep. 4 P. C. 161.

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1861, and yet one was given by the Act of 1840; for the difficulty created by the language of s. 35 of the Act of 1861 does not exist in the Act of 1840. By the civil law there always was a maritime lien for necessaries: Abbott on Shipping, 5th ed. pp. 108, 109.

In this case there is no doubt from the evidence and documents that it was the expectation and intention of the parties that a lien should be conferred.

[The following cases were also referred to:—*The Anna* (1); *The Pacific* (2); *The Princess Charlotte* (3); *The Jenny Lind* (4); *The Turliani* (5); *The Glentanner* (6); *The Fairport* (7); *The Rio Tinto* (8); *The Ocean* (9); *The Neptune* (10); *The Alexander* (11); *The Flecha* (12); *The Wataga* (13); *The West Friesland* (14); *The Gustaf* (15); *The Public Opinion* (16); *The India* (17); *The Juliana* (18); *The Volant* (19); *In re Rio Grande do Sul Steamship Co.* (20); *The Feronia* (21).]

Sir *R. Webster* Q.C. and *L. E. Pyke*, for the respondents were directed to confine their arguments to the questions whether before the Act of 1840 the Admiralty Court recognised a maritime lien for necessaries; and whether the course of decisions or mercantile practice preclude the House from putting its own construction upon the Act.

This House is not debarred from putting its own construction upon the 6th section of the Act. The cases cited by the appellants do not establish a long course of authorities decided upon the basis of there being a maritime lien for necessaries. Those cases were decided upon questions of priorities when the Admiralty Court being seized of the proceeds of the sale of a ship

(1) 1 P. D. 253.
(2) Br. & L. 243.
(3) 33 L. J. (Ad.) 188.
(4) Law Rep. 3 A. & E. 529.
(5) 2 Asp. Mar. L. C. 603.
(6) Swa. 415.
(7) 8 P. D. 48.
(8) 9 App. Cas. 356.
(9) 2 Wm. Rob. 368.
(10) 3 Knapp, 94, 114.
(11) 1 Wm. Rob. 346.
(12) 1 Ecc. & Ad. (Spinks) 438.
(13) Swa. 165.
(14) Swa. 454.
(15) Lush. 508.
(16) 2 Hagg. Ad. 398.
(17) 32 L. J. (Ad.) 185.
(18) 2 Dod. 304.
(19) 1 Notes of Cas. 503, 508; 1 Wm. Rob. 383.
(20) 5 Ch. D. 282.
(21) Law Rep. 2 A. & E. 65.

exercised its equitable jurisdiction in distributing those proceeds amongst the various claimants.

As to the law before the 3 & 4 Vict. c. 65 it is by no means admitted that according to the civil law there was a maritime lien for necessaries (Donellus, De Pignoribus et Hypothecis, cap. 4; Emerigon, Contrats à la Grosse, ch. 12 s. 1; Voet). There is nothing in the books to shew that such a lien existed. Moreover, the Admiralty Court did not administer the civil but the common law. It conferred no more extensive rights than the Common Law Courts (as is clear from the statutes of Rich. II. which are declaratory) although its remedies were more prompt because of the class of cases with which it had to deal. Whatever the civil law may have been, there is no case in the Admiralty Court before the 3 & 4 Vict. c. 65, in which it was decided that there was a maritime lien for necessaries. There are authorities to the contrary: *The Vrow Mina* (1); *The Vibilia* (2); *Hussey* v. *Christie* (3); Abbott on Shipping, 5th ed. pp. 108–117.

The question whether or not a maritime lien exists is a question of right, not of jurisdiction or remedy: *The Neptune* (4). The words of the Act "shall have jurisdiction to decide &c. and to enforce payment &c." do not expressly confer any lien, and no lien ought to be implied unless it is absolutely necessary. Where the legislature intended to confer a maritime lien it did so clearly and expressly: see 7 & 8 Vict. c. 112 s. 16, and the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) s. 191, and *The Parlement Belge* (5).

Before the Act the Admiralty Court exercised its jurisdiction either in personam or in rem. It is not contended by the appellants that where it is exercised in personam a maritime lien is created, and it is inconsistent to say there is a maritime lien when the proceedings are in rem but not if, for the same matter, they are in personam.

Prior to the Act some proceedings in rem were independent of maritime lien, e.g. actions between co-owners, of possession and of restraint. Therefore it is not a correct statement of law to say

(1) 1 Dod. 234.
(2) 1 Wm. Rob. 1, 6.
(3) 9 East, 426.
(4) 3 Knapp, 94, 114.
(5) 5 P. D. pp. 197, 211.

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that whenever there are proceedings in rem there is a maritime lien.

It is clearly established that similar words in the 24 Vict. c. 10 and other Acts do not confer a maritime lien: *The Two Ellens* (1); *The Rio Tinto* (2). Dr. Lushington wavered continually in his construction of the Act. In *The Bold Buccleugh* (3) it was assumed without argument—not decided—that the Act gave a maritime lien in cases of collision occurring within the body of a county.

No inconvenience will result from the interpretation contended for by the respondents. It will not leave the appellants without a remedy against foreigners but will prevent lâches on the part of material men in enforcing their remedies under the Act and so help to free ships from secret liens.

[They also referred to the following authorities:—*The Zodiac* (4); *The Alina* (5); Godolphin's Admiralty Jurisdiction; Coote, Admiralty Practice (ed. 1860) p. 193; Williams and Bruce, Admiralty Practice p. 18; Wynne's Life of Sir Leoline Jenkins, vol. i. pp. lxxviii., lxxxiii; A. Browne's View of Civil and Admiralty Law, vol. ii. (ed. 1802) pp. 75, 81.]

Raikes replied.

The House took time for consideration.

April 5. LORD WATSON:—

My Lords, this appeal is taken in an Admiralty suit, at the instance of the appellants, for recovery of moneys said to have been advanced by them in March 1882 for equipping and supplying with necessary stores the Norwegian ship *Henrich Björn*, which was then lying in the port of Liverpool. The action is in rem, that being, as I understand the term, a proceeding directed against a ship or other chattel in which the plaintiff seeks either to have the res adjudged to him in property or possession, or to have it sold, under the authority of the Court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary

(1) Law Rep. 4 P. C. 161.
(2) 9 App. Cas. 356.
(3) 3 Wm. Rob. 220; 7 Moo. P. C. 267.
(4) 1 Hagg. Ad. 320, 325.
(5) 5 Ex. D. 227.

claims. The remedy is obviously an appropriate one in the case of a plaintiff who has a right of property or other real interest in the ship, or a claim of debt secured by a lien which the law recognises. We have been informed that under the recent practice of the Admiralty Court the remedy is also given to creditors of the shipowner for maritime debts which are not secured by lien; and in that case the attachment of the ship, by process of the Court, has the effect of giving the creditor a legal nexus over the proprietary interest of his debtor, as from the date of the attachment.

The position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect,—that the former, unless he has forfeited the right by his own lâches, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action in rem unless at the time of its institution the res is the property of his debtor. In the present case there was a change in the ownership of the *Henrich Björn* between March 1882 and the time when this suit was instituted. Accordingly it is not matter of dispute that the action must be dismissed, if the appellants have not a maritime lien for the amount of their advances, which attached to and followed the ship, from and after the time when these advances were made.

Before the year 1840 the Court of Admiralty never possessed, although it did occasionally, when not prohibited, exercise jurisdiction in the case of maritime claims arising within the body of a county. In that year an Act was passed (3 & 4 Vict. c. 65) for the purpose, as expressed in the title and preamble, of improving the practice and extending the jurisdiction of the High Court of Admiralty. Section 6 enacts that in future that Court shall "have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time the services were rendered, or damage received, or necessaries furnished, in respect of which such claim

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is made." By sect. 23 it is provided that nothing contained in the Act shall be deemed to preclude Her Majesty's Courts of Law and Equity from continuing to exercise the jurisdiction which they previously had over the several matters and causes of action therein mentioned.

I do not think it necessary to refer to authorities for the purpose of establishing that by the law of England persons who equip or provide necessaries to a ship in an English port have no preference over other creditors, and have no lien upon the ship itself for recovery of their demands. The law upon that point is clear. But the appellants rely upon the provisions of s. 6 of the Act of 1840, as evidencing the intention of the legislature, not merely to give the Court of Admiralty jurisdiction to entertain claims for necessaries supplied to a foreign ship within the body of a county, but also to create a new incident of the claimant's right when he elects to sue in that Court. It seems to be the necessary result of the appellants' contention that the claimant, who is an unsecured creditor without any preference, when he seeks to enforce his claim elsewhere, becomes, by virtue of the Act, a creditor preferably secured when he brings an action in the Court of Admiralty.

The whole provisions of the Act 3 & 4 Vict. c. 65 appear to me to relate to the remedies and not to the rights of suitors. Sect. 6 merely confers "jurisdiction to decide" certain claims which the Court of Admiralty had previously no power to entertain. That enactment enables every person having a claim of the nature of one or other of those specified in sect. 6 to bring an action for its recovery in the Admiralty Court, but it cannot in my opinion have the effect of altering the nature and legal incidents of the claim. It may be that at the time when the Act of 1840 was passed it was not the practice of the Admiralty Court to sustain an action in rem, except at the instance of a plaintiff who had either a real right in, or a proper lien over, the vessel against which it was directed. The authorities cited at the Bar appeared to me to bear out that proposition; but assuming it to be well founded, I do not see how it can affect the present question, because it is admitted that the Court entertained actions in personam as well as in rem, and could, therefore,

give an appropriate remedy in the case of a personal claim to which no maritime lien was attached. It was argued for the appellants that inasmuch as in sect. 6 claims for necessaries supplied are enumerated in connection with claims for salvage, and for damages arising from collision (which have been held to involve a maritime lien), it must be inferred that the legislature means that a right of lien should also be recognised in the case of a claim for necessaries. In my opinion it is impossible to derive that inference from the terms of the clause except by assuming, as Dr. Lushington seems to have done in the case of *The Flecha* (1), that the main object of the Act was to assimilate the law of England to "the general law of the maritime states of Europe."

As I have already indicated, that appears to me to be an assumption inconsistent alike with the title and preamble of the Act and with the character of its provisions. Many foreign states, whose systems of jurisprudence are based on the civil law, admit a maritime lien for necessaries, but the ground upon which the Courts of England have declined to recognise such a lien is not, in my opinion, that it is opposed to some rule or principle peculiar to English law, but that it is contrary to the general principles of the law merchant. The law of Scotland is to a great extent founded upon the civil law; yet in the case of *Wood* v. *Hamilton* (2) the Court of Session held that no hypothec existed for repairs or furnishings in a home port, being of opinion that the question ought to be determined not according to the civil law, but, as in England, upon general principles of commercial law, and the judgment was, on appeal, affirmed by this House. To my mind it is scarcely conceivable that the legislature, if it had been their intention to assimilate our commercial law to that of the foreign states referred to by Dr. Lushington in the case of *The Flecha* (1), should have endeavoured to effect that object by confining the assimilation to suits instituted in the English Court of Admiralty.

It was further argued that your Lordships are precluded from deciding that sect. 6 does not create any maritime lien in the case of claims for necessaries, by an authoritative course of

(1) 1 Ecc. & Ad. (Spinks), 438. (2) 3 Paton, Sc. App. Cas. 148.

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decisions and practice to the contrary in the Courts below. I do not think it necessary to refer in detail to the authorities bearing upon this point, which were carefully reviewed by Fry L.J. in delivering the judgment of the Court of Appeal. The case of *The Flecha* (1), which was decided by Dr. Lushington in 1854, does not seem to me to be a direct authority in support of the appellants' argument. It was, no doubt, an action in rem for necessaries; but the owner, on whose credit the furnishings were made, appeared and put in bail, and the report of the case does not indicate that any question was raised in regard to lien. In the case of *The West Friesland* (2) in 1859, and of *The Ella A. Clark* (3) in 1863, the same learned judge did decide in terms that, in virtue of sect. 6 of the Act of 1840, the plaintiffs, who sued in respect of necessaries supplied to a foreign ship in a home port, had a maritime lien, and were consequently entitled to proceed in rem, although the ship had been transferred in bonâ fide to a new owner. His judgment in *The West Friesland* (2) was recalled, on appeal, by the Privy Council, who disposed of the case on other grounds, and carefully avoided any expression of opinion upon the law which had been laid down in the Court below. So far, therefore, as regards judicial decision, the argument of the appellants appears to me to rest upon the judgment of Dr. Lushington in the case of *The Ella A. Clark* (3). No one has done more to impair the authority of his decisions in *The West Friesland* (2) and *The Ella A. Clark* (3) than Dr. Lushington himself, by his clear statement of the law in other cases. The principle of these decisions has never been confirmed or approved of by any Court of Appeal. They were referred to by the Privy Council in *The Two Ellens* (4) and *The Rio Tinto* (5); but the language used in the former of these cases by Mellish L.J., and in the latter by Sir James Hannen, appears to me to be as much calculated to suggest doubt as to imply approval.

In these circumstances I have come to the same conclusion as the Court of Appeal. I do not think that there is any decision

(1) 1 Ecc. & Ad. (Spinks), 438.
(2) Swa. 454.
(3) Br. & L. 32.
(4) Law Rep. 4 P. C. 161, 167.
(5) 9 App. Cas. 356, 361.

of such authority, or that any such case of communis error has been made out, as would justify your Lordships in refusing to give effect to the provisions of sect. 6 of the Act of 1840 according to their just construction.

I am, therefore, of opinion that the order of the Court of Appeal must be affirmed, and I move accordingly, and that the respondents do have the costs of this appeal.

LORD BRAMWELL :—

My Lords, the question is whether the appellants have a maritime lien on the *Henrich Björn*, that is, a right to have satisfaction from the ship of a claim arising when the ownership of the vessel was, as to five-sixths, different from what it was when the suit now before us was instituted. The claim is for necessaries, or money advanced to purchase necessaries, for the outfit of the ship, a foreign ship, lying at Liverpool. I will assume there was such supply or loans. Now, no such lien existed, it is admitted on all sides and is certain, before 3 & 4 Vict. c. 65 s. 6, and also certain that if it now exists it was given by that statute. But it is also certain that it is not thereby expressly given. For the words of the section are: "the High Court of Admiralty shall have jurisdiction to decide all claims and demands for" certain specified matters, including "necessaries supplied to any foreign ship, and to enforce payment thereof, whether it may have been within the body of a county or upon the high seas" when the necessaries were supplied. Not a word about a lien; jurisdiction alone is given. So that if a lien is given it is by implication only.

Now, I think, that where the legislature in its laws, or parties in their agreements, might have expressly stated a particular intention and have not, that intention ought not to be implied, and the law or agreement dealt with as if the intention were expressed, without the most cogent considerations amounting almost to a necessity. I am of opinion that they do not exist as to this statute. Let us examine the grounds on which it is contended they do.

In the first place it is said that the object of the legislature was to assimilate the law of England to the law of other European

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countries, that other European countries gave such a lien, and that, therefore, it ought to be implied that this statute gives it. But we shall see presently that this assimilation would make the law of England different to that of Scotland and Ireland, and, as my noble and learned friend who has just addressed your Lordships has said, it would make the rights different if administered in a court of common law from what they are in the Admiralty Court.

Lord Bramwell.

Then it is said that our law gave such a lien where the supply was at sea, and that it follows that when the statute gives jurisdiction for necessaries supplied within the body of a county the lien is given. As to this, there is a failure to shew that our law did give such a lien for necessaries supplied on the high seas. Lord Tenterden's opinion is to the contrary; see also the Privy Council case reported in 3 Knapp, Privy Council 94. Further, 3 & 4 Vict. c. 65 is a law relating to the English Court of Admiralty only. It does not affect Ireland or Scotland. And if construing it as the appellants require would make our law in England like that of foreign nations, it would make it unlike that of Ireland, and, as I am informed by my noble and learned friend who has just addressed your Lordships, unlike that of Scotland. The truth is, that the legislature, or draftsman of the Act, was not thinking of a maritime lien, and if it has been given, it has been so unintentionally.

But then it was said that jurisdiction is given in cases of salvage and collision, and that as to them a maritime lien existed when the salvage or collision arose on the high seas, and that it could not be intended that there should not be a similar law if they arose within the body of a county, that, therefore, the words of the statute by implication give such lien in those cases, and are therefore sufficient to give it in the case of necessaries. Now it may be admitted that it would be strange that if a collision occurred just below the Nore there should be a maritime lien, while if it was just above there should not be. How that may be I do not say, but assuming there would be a maritime lien in case of a collision within a county, and that it might be in a sense said to be given by the statute, it by no means follows that one is given in the cases of towage or necessaries. It may well

be that salvage and collision within counties are put in the same plight and condition as on the high seas, without the consequence as to necessaries contended for. Jurisdiction is by the section given in cases of "towage," and it cannot be pretended that there was any maritime lien as to that when it occurs on the high seas. It was, indeed, said it was a sort of salvage, but it certainly is not. And the Admiralty Court, I take it, would have, under the statute, jurisdiction in a case of towage where the ship had been let and the owner was not liable.

I do not see, therefore, any reason for implying that which, if intended, might have been expressly stated. But there are many reasons to the contrary besides the general one against needless implication. The law would, as I have said, be made different to the law of Ireland and Scotland. Further, when the legislature meant to give a lien, it knew how to do so, and did it in express terms, as in the case of masters' wages: 7 & 8 Vict. c. 112 s. 16, and the Merchant Shipping Act 1854 s. 191. Then it is not given, as it might have been, for necessaries supplied in cases where jurisdiction is given by 24 Vict. c. 10 s. 5. Further, if giving the Admiralty jurisdiction would give a maritime lien, the effect of 24 Vict. c. 10 would be to give a maritime lien for the rent of a house.

The statute gave, as it says, jurisdiction and jurisdiction only; a jurisdiction over matters arising within the body of a county as to which there was jurisdiction before if they arose on the high seas; a jurisdiction to decide all such claims and demands, and enforce payment thereof. Jurisdiction as to towage was not created by the statute. It existed before with no maritime lien (Williams & Bruce, Admiralty Practice, p. 152).

But the decisions must be examined. I cannot help thinking that the confusion which exists in them is attributable to a notion that Admiralty jurisdiction only existed where there was a maritime lien, so that to give jurisdiction was to give a lien. That the law was so, was stoutly contended before us; but ultimately, and most properly, that was given up, on the strength of authorities shewing beyond doubt that Admiralty jurisdiction exists and always existed where there was no such lien. Proceedings might be in personam without the res being affected. And when they

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were in rem, though a security might be obtained for the payment of what was recovered, it might well be that there was no lien. With respect to the decisions of Dr. Lushington, I shall content myself with saying, with a most affectionate respect for his memory, that they neutralize each other,—that, if anything, they are more against than in favour of the lien claimed, especially his decision and reasons for it in *The Alexander* (1). And here I may observe that I agree in the remark of Fry L.J., that the jurisdiction given was not an old one revived, for it was prohibited because it did not exist rightfully. In *The Bold Buccleugh* (2) it was assumed that a maritime lien existed in cases of collision within the body of a county, which could only be because it was given by 3 & 4 Vict. But two remarks are to be made on that case; one, that it was assumed without discussion; the other, that even if it was given it was in cases of collision; as I have said, it does not follow that it was so in the case of necessaries.

But then there is the opinion of Mellish L.J. in Law Rep. 4 P. C. 161, where he says their Lordships are of opinion that the case of necessaries may be supported on the ground that though the words are hardly sufficient to create a maritime lien, yet "it appears designed to enlarge the jurisdiction the Admiralty already had in matters forming the subject of a maritime lien." The following remarks arise on this. It is obiter; that does not shew a remark is valueless, but it certainly shews that it is not so valuable as a specific decision on a question directly raised. If the question had been raised there, I do not think Mellish L.J. would have said, as he did, that it was "a matter forming the subject of a maritime lien." Further, the expression is "their Lordships are of opinion that the decisions *may* be supported." I am not sure that means more than "possibly may be."

The case of *The Rio Tinto* (3) is in point, and the reasoning there used may be entirely adopted. It convincingly decides that there is no maritime lien for necessaries as in the present case is contended for.

I have reason for saying that the opinion I am now expressing

(1) 1 Wm. Rob. 288, 346. (2) 7 Moo. P. C. 267.
(3) 9 App. Cas. 356.

is not opposed to that of the President of the Probate and Admiralty Division.

On these grounds and authorities I am of opinion that no maritime lien existed in this case and that the judgment should be affirmed.

LORD FITZGERALD :—

My Lords, I had the honour of being one of the tribunal which decided the appeal in the case of the *Rio Tinto* (1), and I then formed an opinion on the question whether the 6th section of the 3 & 4 Vict. c. 65 created a maritime lien for "necessaries supplied to a foreign ship" which I have not had since any reason to change. The Judicial Committee had in that case to consider this very question: their decision was unanimous, and the reasons for it as delivered by Sir James Hannen met with the entire approval of the Lords present. It is a case in point, though it does not decide the very same question as that now before us, but I agree with my noble and learned friend (Lord Bramwell) that the "reasoning there used may be entirely adopted." The conclusion which I had reached in the case of the *Rio Tinto* (1) is in precise accordance with the decision which my noble and learned friends have just announced and with the clear and exhaustive judgment of the Court of Appeal as delivered by Fry L.J.

The course of this cause has been very singular. The plaintiffs in their statement of claim do not allege or set up any maritime lien, and the defence was substantially a denial that, save as to a small sum paid into court, any necessaries had been supplied by the plaintiffs. It came before Sir James Hannen for trial, but the allegation of a maritime lien does not appear to have been raised, nor was his attention at all directed to it. The parties then went before the Court of Appeal, and it was in the argument there that maritime lien was for the first time suggested.

I entirely concur with my noble and learned friends and have nothing to add to their reasons. I desire to point out that the two main propositions on which Mr. Cohen rested the appellants' case—viz.: 1. That at the time when the *Bold Buccleugh* (2) was

(1) 9 App. Cas. 356. (2) 7 Moo. P. C. 267.

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decided there was no proceeding in rem in the Admiralty Court save where there was a maritime lien; and 2. That there was no procedure in that Court to found jurisdiction except where there was a maritime lien—were not shewn to be well founded.

It must now be taken as established that prior to 1840 the Court of Admiralty did exercise a jurisdiction in rem for the purpose of enforcing a claim against the owner though there was no maritime lien, and also in personam, in proper cases.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 5th April 1886.

Solicitors for appellants: *Hollams Son & Coward.*
Solicitors for respondents: *Irvine & Hodges.*

[HOUSE OF LORDS.]

H. L. (E.) 1886 *May* 28.

WILLIAM TURQUAND AND FREDERICK WHINNEY (TRUSTEES OF THE ESTATE AND EFFECTS OF FREDERICK SEARLE PARKER AND WILLIAM SEARLE PARKER, BANKRUPTS) . . } APPELLANTS

AND

THE BOARD OF TRADE AND THE CHIEF OFFICIAL RECEIVER IN BANKRUPTCY . . . . . } RESPONDENTS.

Bankruptcy—Official Receiver—Powers when acting as Trustee—Power to sell Bankrupt's Property—Bankruptcy Act 1883 (46 & 47 *Vict.* c. 52) ss. 54, 56, 68–70.

Under the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) the official receiver, when acting as trustee in a bankruptcy in the interval between the adjudication and the appointment of a trustee by the creditors, has power to sell the bankrupt's property, though it be not of a perishable nature.

Decision of the Court of Appeal (15 Q. B. D. 196) affirmed.

APPEAL from a decision of the Court of Appeal.

Upon the bankruptcy in 1884 of the two Parkers, solicitors in partnership, a receiving order having been made (March 13), the

official receiver, after the adjudication (March 20) and before the appointment of a trustee by the creditors (April 18), sold by auction the furniture and effects belonging to the debtors' several private estates.

Cave J. held that the official receiver had no such power of sale: *In re Parker and Parker* (1).

The Court of Appeal (Brett M.R. Baggallay and Bowen L.JJ.) reversed that decision and held that he had the power (2).

May 27, 28. *Arthur Charles* Q.C. and *J. E. Linklater*, for the appellants contended that the object of the Bankruptcy Act 1883 was to give the creditors full control over the administration of the estate and to enable them to interfere at any stage (ss. 15, 70, 89): that it would be inconsistent with this object to hold that the official receiver had the power (without consulting the creditors) to sell the whole of the bankrupts' property and so defeat the option of the creditors to have a composition or a scheme instead of a bankruptcy: that the creditors knew when they themselves appointed a trustee that he could sell unless they controlled him: but that they could not be supposed to know that this power suddenly sprang up in the official receiver at the moment of adjudication when the creditors had not even been called together.

The appellants' view of the various sections appears so fully from the judgment of Cave J. (3) upon which they relied, and from the report of the argument offered to the Court of Appeal on behalf of the creditors' trustees (4), that it is unnecessary to repeat the arguments here.

Sir *Charles Russell* A.G. Sir *Horace Davey* S.G. and *M. Muir Mackenzie*, for the respondents were not heard.

EARL OF SELBORNE:—

My Lords, the argument in support of the appeal has been very clearly put before your Lordships, but I believe that none of you wish to hear the argument on the other side. I might almost content myself with saying that I agree with the judg-

(1) 14 Q. B. D. 407.
(2) 15 Q. B. D. 196.
(3) 14 Q. B. D. 407.
(4) 15 Q. B. D. 198-201.

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Earl of Selborne.

ment which has been given by the Court of Appeal. I will, however, with respect to the argument, endeavour very briefly to put the way in which it strikes me.

It is admitted on all hands that the 54th and 56th clauses and sub-section 3 of the 68th clause in the Act, if they stood alone, would place the official receiver, after the adjudication, in the position of a trustee in bankruptcy for the general purposes of those provisions in the Act which relate to the trustee in bankruptcy, subject of course to any special enactments (if any can be found) bearing upon the duties of the official receiver while he is trustee. That being admitted, and the express terms of the 68th section throwing upon the appellants the burden of pointing out something in the Act which is repugnant to the exercise by the official receiver, when trustee, of the power of sale given by the 56th section, nothing is offered for that purpose except some vague suggestions as to a scheme of the Act which is supposed to be at variance with a sale by any one not selected by the creditors, and the 70th section, which is supposed to be a provision overriding those to which I have referred and limiting the powers of the official receiver when trustee.

As to the scheme of the Act, I confess that I always listen to an argument founded on a general scheme, or general intention, with caution. I will not say that such arguments as to deeds or an Act of Parliament are never well founded. There can be no doubt that if in the preamble or in any other part of the Act some purpose or intention is expressed, that should be borne in mind in construing everything which is ambiguous or open to more constructions than one; nor do I say that such a view of the purpose and intention of an Act of Parliament may not sometimes properly be collected otherwise than from the declared policy expressed in the preamble, or elsewhere. But we are not to treat everything as the policy, or the intention, or the scheme of the Act which any one may surmise to be so. If that is to govern us it should be clearly shewn that it is so.

To me it seems at least as reasonable to say that the scheme and the general intention of this Act is to provide for a trustee, for a series of persons filling the office of trustee, in all events and at all times from the date of the adjudication, as to say that

there is any particular scheme or intention more especially applicable to one kind of trustee than to another. The one scheme is consistent: the trustee is to be invested with certain powers deemed necessary or convenient for the administration of the estate; the trustee may be appointed in various ways, and from time to time. The creditors may, simultaneously with the adjudication, appoint a trustee of their own selection. If they do not, then until they do so or decline to do so within the time allowed them for that purpose the official receiver is to be trustee de facto, and the estate is to vest in him, and he is to be trustee for the purposes of the Act. A certain time is allowed to the creditors to choose a trustee for themselves. If they do, when that choice is complete it supersedes the earlier official appointment, and the vesting follows. If they do not, then after the time allowed them the Board of Trade comes in, and then the trustee appointed by the Board of Trade is trustee, and if there is a vacancy from time to time and no one is appointed to fill the vacancy, either by the creditors or by the Board of Trade, the official receiver comes in again.

It is at least an equally consistent view of the general intention of the Act that there should be one office ejusdem generis all through, filled from time to time in different ways to provide for the different cases which may arise. But that being, as it appears to me, a consistent intention which may be collected from the provisions of the Act, and the three clauses I have referred to as to the official receiver when trustee being in accordance with it, still it is possible that there may be something else in the Act which draws the distinction suggested by the appellants, and limits the powers of the official receiver, when trustee, in a manner not applicable to a trustee selected by the creditors. It is admitted that unless such a limitation or restriction can be made out from the 70th section there is no such thing in the Act; because the earlier sections referred to appear to me to have no bearing at all upon the matter. But the 70th section, in those passages which were supposed by a very learned judge, Cave J., to limit the powers of the official receiver as trustee, appears to me, with very great submission to that learned judge, to have no bearing upon and no relation to the powers or the

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action of the official receiver when he is trustee and in that character. Those passages deal entirely with certain powers which he is to have as official receiver; and those powers during a certain part of the period over which the provision extends are the only powers which the official receiver will have; because he does not become trustee at all until adjudication. Therefore the clause is perfectly officious even if that were the only period during which there was a distinction between the powers of "manager" or "receiver" and the powers of "trustee." Before he had the powers of trustee he would have no other powers than those of receiver and manager; but it is perfectly consistent that after he has become trustee, and down to the time at which there is another trustee appointed, he should have those powers which specially belong to the office of receiver and manager as well as those powers which belong to the office of trustee; and the 70th section merely says that so far as he is acting in the character of receiver or manager, he shall do certain things, leaving it to the rest of the Act to tell him what he may do in the other character, with which that section does not deal, of trustee. I say it does not deal with that character; not forgetting, that in that section is contained a provision, that when there is a vacancy in the office of trustee, he is to fill that vacancy; but for the duties and the powers belonging to the office of trustee it was not necessary for that section to provide, because that had been done elsewhere, and not being necessary, it is not done there.

It appears to me that the express provisions and the natural effect of the earlier clauses are perfectly consistent with the 70th section, which deals with another matter altogether.

I therefore agree with the judgment now under appeal, and move your Lordships that it be affirmed with costs.

LORD BLACKBURN:—

My Lords, I am of the same opinion. I scarcely think that it is necessary that I should add anything to what has been said already, but I will say a word or two out of respect to Cave J. I think Cave J. rightly enough thought that the official receiver, as official receiver and in that capacity, as separate from trustee, had not the power to sell this property, and I think that he

rightly enough thought that the sections which define the powers of the official receiver shew that he had not power as such to do it; but Cave J. seems to me to have assumed that where the receiver was also trustee, the effect of the sections defining the powers and duties of the official receiver, as such, shewed that he was to have no more. I cannot think that at all. It seems to me quite a possible thing that where there is an official receiver who also happens to be appointed trustee the powers may be cumulative, he may still continue to have his powers as official receiver whatever they are, and also exercise at the same time any of the powers of trustee that are not inconsistent with them. Now, upon that the argument has been that it cannot be that that was intended, for if the official receiver during the interval after the adjudication and before the appointment is trustee, with the powers which a trustee would have (subject of course to the control of the Court) during that time of selling the property, which is what has been done in this case, it would be contrary to the spirit of the Act, which, it seemed to be argued, is to take away all power and control from the officials and give it to the creditors. There is nothing, however, in the Act that I can see that says that.

In construing this Act, of course, like every other Act, we must take the whole of the Act together, and as this is a very long Act, containing I think about sixty pages of very closely printed matter, it requires in order that we may be certain that we omit nothing, that we should look carefully at it altogether and consider all the clauses. That has been carefully done in the Court of Appeal, and the result is to bring about a very clear opinion, in my mind at least, that whilst the official receiver is trustee after adjudication he may exercise the powers of a trustee, one of which would be to sell, subject of course to anybody interfering who had the right to interfere or getting the Court to interfere to prevent his doing so, but still having a power to sell; and consequently that this power was exercised within the jurisdiction of the official receiver as trustee at that time.

The possibility of course of that power, like every other power, being abused, exists. It seems to be an admitted fact that in this case it was not abused; but such a power may be abused, and the

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control which would be exercised by the Court to prevent it, if it seemed likely to be abused, or to punish it if it were abused, one need not inquire into. That there is such a control and such a power, seems to be pretty clear.

I am, therefore, entirely of opinion that the proposed order that the appeal be dismissed, and that the judgment appealed against be affirmed, is the right order to make.

LORD WATSON:—

My Lords, I am also of opinion, after hearing the very able argument that has been addressed to us in this case, that the Court of Appeal rightly construed the statute, and that their order ought to be affirmed.

LORD FITZGERALD:—

My Lords, I too concur in thinking with the noble and learned Earl that the construction put by the Court of Appeal upon the sections of the Act of Parliament which relate to the question now before us, was the correct interpretation of that statute, and I will also add that the conclusion arrived at is the wisest in the interest of the creditors.

It is true, as it has been observed, that this authority given to a public officer may be the subject of abuse, but I think that is amply provided for in a preventive manner by sect. 90; and there is also authority given to the Board of Trade to punish a trustee for any official misconduct.

LORD HALSBURY:—

My Lords, I am of the same opinion. It appears to me that the policy of the Act was that there should be some person, who, immediately after adjudication, should have complete dominion over what would then be the creditors' estate, in trust for them. I think it would be very disastrous to the interests of creditors if there was no person who could have complete dominion over the creditors' estate. I think that the 54th and 56th sections of the Act give that dominion, and that no other section of the Act of Parliament qualifies or cuts down the plain, simple and ordinary meaning of the language of those sections.

I therefore am of opinion that the order proposed by the noble and learned Earl is the order which your Lordships should make.

LORD ASHBOURNE:—

My Lords, I concur. I think it is plain that the power of sale which is questioned in this appeal does exist. I think that sects. 54, 56, and 68 are clear, and that there is nothing in any part of the Act to qualify their interpretation.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 28th May 1886.

Solicitors for appellants: *Linklater & Co.*

Solicitor for respondents: *Walter Murton, Solicitor, Board of Trade.*

[HOUSE OF LORDS.]

H. L. (Sc.)
1886
May 17.

WESTROPP'S DIVORCE BILL.

Divorce—Wife's Bill—Adultery coupled with Cruelty.

The same evidence which since the Divorce Act, 1857, enables the Divorce Court to pronounce a decree for dissolution of marriage will be considered by the House of Lords sufficient ground for passing a Divorce Bill relating to Ireland, where that Act does not apply.

THIS was a meeting of the House to hear counsel and witnesses on the second reading of an Act intituled "An Act to dissolve the marriage of Louisa Jane Moore Morgan Westropp with Edward Spread Morgan Westropp, and to enable her to marry again, and for other purposes."

Inderwick, Q.C., and *Colthurst* (of the Irish Bar), appeared for the petitioner, and opened the case in support of the preamble of the Bill:—

The House had hitherto passed a Bill for divorce on the application of the wife, if, coupled with adultery, there were other offences against the matrimonial state. In *Mrs. Addison's Case*, in 1801, there was incestuous adultery with the wife's sister (1). *Mrs. Turton's Case*, in 1831, was of the same description (2). In *Mrs. Battersby's Case*, in 1840, there was adultery and bigamy, with a conviction and transportation of the husband (3). Then came the case of *Mrs. Hall*, in 1850, where relief was also granted; but there, though there was bigamy, there was no conviction (4). In 1848 an application was made by *Mrs. Dawson* on the ground of adultery and cruelty, but this House refused to read the Bill in consequence, in a great measure, of a certain unguardedness, if not levity, which transpired in the conduct of Mrs. Dawson (5). Then came the Divorce Act of 1857, which applies to England only, and by sect. 27 it was enacted, inter alia, that the injured wife could obtain a divorce for adultery coupled with cruelty, the

(1) Macq. H. L. 475; Macq. Div. p. 39.
(2) Macq. H. L. 478; Macq. Div. p. 40.
(3) Macq. H. L. 479; Macq. Div. p. 41.
(4) Macq. Div. 41.
(5) Macq. Div. 43.

cruelty being such as without adultery would have entitled her to a divorce à mensâ et thoro. On this case being heard in Ireland, the Lord President of the Matrimonial Division, on the 24th of November, 1885, held that it was proved that the husband had committed adultery and had treated the petitioner with legal cruelty: and that on either ground alone she was entitled to a decree of separation à mensâ et thoro.

They stated that Lady Jane Moore, a material witness as to the acts of cruelty, and who had been examined in the Court in Ireland, was unable to attend. They produced a doctor's certificate to that effect.

[HERSCHELL, L.C.:—The House will proceed, and if necessary adjourn the Bill for the attendance of the lady.]

No counsel appeared for Mr. Westropp.

The evidence was then taken. The adultery with Hannah Roche was clearly proved, and for this report it is only necessary to give the evidence as to the cruelty.

Mrs. Westropp said—

She was married on the 8th of June, 1878, she being then nineteen and her husband twenty-two. They were first cousins, but she only knew him intimately three months before the marriage. Her husband had no income of his own; they therefore went to live with her aunt, Lady Jane Moore, and grandfather, the late Lord Mount-Cashell, at Moore Park. There were three children, all daughters, born of the marriage. Shortly after the marriage her husband gave way to intemperance. When drunk his personal habits were disgusting. He also used most foul language to her. One day, coming home from a dance about three months after their marriage, he was very angry with her, and knocked the glass out of the framework of the carriage. She was very much frightened, and hysterical. Next morning her husband wrote an apology. Later on, in 1878, he was angry at breakfast, and put his fist in her face, and, her grandfather remonstrating, he shook her grandfather by the collar of the coat and threatened him with the bread knife. Her grandfather was an old man between eighty and ninety.

Shortly before her eldest child was born, early in March, 1879, she and her husband were driving. Her husband was drunk. The horse was a very spirited one, and he kept exciting it. The horse had run away before, and the coachman warned her and said the horse would bolt. She was frightened and got out; her husband pushed the coachman out at the back of the trap. The horse bolted; the reins snapped, and the trap was smashed. Shortly before the birth of the second child, she was driving home from the station with the groom when they met her husband. He was very angry, and pulled the groom out of the

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trap and beat him. She was frightened that he would make the horse again bolt, so she drove off alone and obtained assistance on the way. Within a month of the birth of her second child she was in the stone hall of Moore Park, when her husband lifted her arms above her head and swirled them rather, lifted her off her feet, and laid her down on her back on the floor. He was abusing her at the time. Shortly after the birth of this child, when it was three or four days old, her husband came into the room and threw himself down on the bed, where the child had been a few moments before. She thought the child was killed, and was very much terrified. In June, 1881, she was driving with her husband, who was drunk, but not very. He was abusing her for talking to a gentleman who sat next her at a concert, and said he would shoot her. It was dark, and she heard him take out a revolver he carried, which she knew was loaded when he left the house. She was very frightened, and said she would stop the cab. He then put it away. He said in the event of his shooting her, nothing would be done to him, as he could prove there had been madness in his family.

In the summer of 1881 he came home drunk. She heard him calling her in most violent language, and smashing the things downstairs. She took refuge in an old-fashioned cupboard in her aunt's bedroom. Her aunt locked the cupboard door and also the bedroom door. Her husband burst open the bedroom door, and smashed the things in the room. Another time he came into her aunt's room at 12 o'clock at night. Her eldest little girl was there in a cot. He knocked the cot about, terrifying the child, and said he would take her away. She remonstrated, and he then threatened to shoot her, and went to fetch his revolver. She fled down the stairs, and when she got to the bottom she saw him on the second landing pointing the revolver at her, and he again said he would shoot her. She was in a dreadful state, and said it did not matter much if he did; she was so miserable. About March, 1883, he spent all his nights away. One morning, coming in at breakfast time, her eldest girl was so nervous she spilt some milk; he roared at her, and she clung to witness. Her husband told her to put her down, and because she did not do so at once he hit her with his closed fist on the side of the face; from the blow the ear and gland became swollen. Her aunt was present, and the servant coming in she shewed her the angry red mark. He often ill-treated the children in her presence. He would hit them on their bare legs with a riding whip. They were only two or three years old at the time. Her aunt shewed her a cut below the eye on the face of her eldest girl. She accused her husband; he said she would not come to him. In 1883, for amusement, he would spit all over her face and arms. When he did that he was sober. She believed that if she had continued to live with him she would have been dead long since. In consequence of what she heard on the 24th of June, 1883, she accused him of committing adultery with a girl called Hannah Roche, and refused to cohabit with him any more. She never again occupied the same bedroom with him, and instituted these proceedings in Ireland in August, 1883.

Jane Searle said—

That going into the breakfast-room of Moore Park one morning she met Mr. Westropp coming out. She saw an angry mark on Mrs. Westropp's face. Mrs. Westropp told her that Mr. Westropp had struck her.

LORD HERSCHELL, L.C.:—

In this case I think it clear that the adultery alleged in the preamble of this bill of Mr. Westropp with Hannah Roche has been established beyond doubt, and I think that the cruelty alleged has also been established. I think that the conduct of Mr. Westropp to his wife was such as not only to inflict bodily injury upon her upon one occasion, but also to put her in reasonable fear on many occasions; and that his behaviour to one of the children in her presence, and his threats to her on one or two occasions, and his conduct to the children when she was in a delicate state of health were such as to reasonably cause fear on her part so that she could not continue to cohabit with him with any reasonable prospect of maintaining her health and well-being.

There appears to have been a precedent in the year 1840 (1) in this House for granting a divorce to a wife upon adultery, cruelty, and bigamy being established. Whatever may have been the case prior to the passing of the Divorce Act of 1857, I think that since the passing of that Act whatever would justify a divorce and afford a legal ground for it, according to the provisions of that Act, where that Act prevails, will afford sufficient ground for an application to the Legislature to grant a divorce in that part of the United Kingdom where the Act does not itself operate.

I therefore advise your Lordships that the preamble has been established, except as to that part which refers to Mary Askern, which will be amended in committee.

LORD BLACKBURN:—

I think the guide that ought to be adopted by the House in such a case is this. I do not say that you may not pass *Acts* upon other occasions also, but this at least you may do,—whenever that is proved which in a Court of law in England would be held to be sufficient ground for a divorce, that is sufficient ground for this House to pass a Divorce Bill relating to Ireland where the Divorce Act does not apply. And I think in this

(1) *Mrs. Battersby's Case*, Macq. H. L. 479.

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case, leaving out the allegation about Mary Askern, upon which no evidence has been given, the rest of the preamble is quite sufficiently proved. It is proved that there was adultery, and it is proved that there was cruelty, much more than would have entitled the unhappy wife to a separation à mensâ et thoro independently of the adultery.

LORDS WATSON, FITZGERALD, HALSBURY, and ASHBOURNE concurred.

The Bill was then read a second time.

And subsequently amended in committee and passed.

Agents for the petitioner: *Sharpe, Parkers, Pritchard, & Sharpe, for W. H. Corker, Cork.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1886 *March* 4.

NEILSON, JUNIOR . . . . . APPELLANT;

AND

MOSSEND IRON COMPANY AND OTHERS RESPONDENTS.

Partnership—Expiration of Term—Business continued without fresh Articles—Operation of old Articles—Partnership-at-Will — Right of each Partner instantly to determine the Partnership.

When the members of a mercantile firm continue to trade as partners after the expiration of the term limited by the partnership articles, without making any new agreement, the original contract is prolonged by tacit consent, and all its conditions remain in force, except in so far as they are inconsistent with any implied term of the renewed contract. An implied term of such a new contract is that each partner has the right, when acting bonâ fide and not for the purpose of obtaining an undue advantage, instantly to determine the partnership.

A clause of a contract of copartnership provided, inter alia, that "If three months before the termination of this contract, the whole partners of the company shall not have agreed to carry on the business thereof, any one or more of them who may be desirous of retiring shall be entitled to do so, and shall immediately, on the completion of the balance after-mentioned, be paid out, by the partners electing to continue the business, his share in the concern, as the same shall be ascertained by a balance of the company's books, as at the termination of the contract to be completed, within not

more than three months from said termination; . . . . but if the whole partners wish, the property and assets of the copartnery shall be disposed of as follows:—It shall be competent for any one of the partners, for himself or for any one or more of them together, to give in offers for the same as a going concern, and the highest offerer is to be held to be the purchaser; and in case only one offer was made, the party making it was to be the purchaser, at such a price as shall be mutually agreed, and in case no offer was made, then the said property and assets shall be realised in such manner as shall be mutually agreed upon, or as shall be fixed by the arbiter named." The business was carried on after the term limited by the contract of copartnery had expired without any new agreement:—

Held, reversing the decision of the Court below, that this clause had no longer any application; and that each partner was at liberty to determine the whole partnership whenever he thought proper.

APPEAL from the First Division of the Court of Session, Scotland.

The sole question in this appeal was whether Hugh Neilson, junior, the appellant, has a right to have the business carried on between him and the respondents, the Mossend Iron Company, wound up and the partnership assets sold and divided among the partners, or whether he is only entitled, as the respondents submit, to have his share paid to him as the same appears in the partnership books.

About 1842 the Mossend Iron Company was founded; and between 1851 and 1866 the partners were William Neilson and his brothers Walter and Hugh Neilson. In the latter year, William Neilson's son James was assumed as a partner, and a contract of copartnership, dated the 22nd and 28th of March, 1867, was entered into between the four partners for a term of seven years from the 31st of May, 1866.

In 1875 Hugh Neilson, junior, the appellant, also a son of William Neilson, was assumed as a partner. A draft of a new contract was proposed, but never executed, in which the clauses of the deed of 1867 were proposed to be slightly modified, and the further term for which the partnership was to be carried on was for seven years, or until the 31st of May, 1882.

The partnership shares were to be divided into ninety-six shares of £1562 10*s.* each, of which twenty-nine shares were to belong to Walter, thirty-six to William, nineteen to Hugh, seven to James, and five to Hugh Neilson, junior.

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William Neilson died on the 24th of May, 1882, leaving a trust disposition and settlement, and under this his executors have caused some litigation in attempting to be made partners; but this question does not affect the sole question involved in this appeal (1). After William Neilson's death the company continued to carry on business as before, and since the expiration of the term named in the draft contract of 1875 no new contract has been entered into.

On the 4th of May, 1883, the appellant, Hugh Neilson, junior, gave notice to the respondents, the Mossend Iron Company, requiring that the partnership should be dissolved; and this demand not having been answered, he, on the 14th of May, 1883, raised this action by summons, concluding, inter alia, for decree that the partnership should be wound up and the partnership assets realized, the liabilities discharged, and the surplus divided among the persons entitled thereto.

The respondents, the other partners in the Mossend Iron Company, object to the company being wound up, contending that the provisions of the draft contract for 1875, or 1867, are still applicable, although the partnership has become one at will; and that the appellant is only entitled to have his share paid out to him in terms of the 12th article of the draft contract of 1875.

This clause is as follows:—

> If, three months before the termination of this contract, the whole partners of the company shall not have agreed to continue to carry on the business thereof, any one or more of them who may be desirous of retiring shall be entitled to do so, and shall immediately, on the completion of the balance after-mentioned, be paid out, by the partner or partners electing to continue the business, his or their share and interest in the concern, as the same shall be ascertained by a balance of the company's books, as at the termination of the contract to be completed, within not more than three months from said termination, and that either in cash, or by his or their bills, with security; and in the event of the partners differing as to the security, or as to the date at which the bills shall be drawn, or otherwise, the terms shall be fixed by the arbiter after mentioned; but, if the whole partners wish, the property and assets of the copartnery shall be disposed of as follows, viz.:—It shall be competent for any one of the partners by himself, or for any one or more of them together, to give in sealed offers for the same as a going concern, but under and subject to the whole debts and liabilities of the copartnery as at the date of the dissolution. Which sealed offers shall be opened at a given place and time by a neutral party

(1) 12 Court Sess. Cas. 4th Series, 499.

to be named by the partners or by the arbiter hereinafter named; and the highest offerer shall be held to be the purchaser, and shall be bound to pay the price, and otherwise implement his part as purchaser within the time and in the manner that shall have been mutually agreed upon beforehand or been fixed by the arbiter after named, on the application of any one of the partners; and in case any two of the said offers shall be equal in amount, the parties making the same shall be entitled, if they see fit, to give in new sealed offers at the meeting fixed for opening the original offers, and the highest offerer under said new offers shall be preferred as purchaser, and be bound to pay the price, and otherwise implement the provisions as aforesaid; and in case only one offer shall be made, the same shall not be opened, but the party making it shall become the purchaser at such a price as shall thereafter be mutually agreed or fixed by the arbiter after-named, and in any one of these cases the price (after deducting expenses) shall be divided among the partners according to their respective rights and interests in the copartnery, and in case no offer is made, then the said property and assets shall be realized in such way or manner as shall be mutually agreed upon, or as shall be fixed by the arbiter hereinafter named, and with the proceeds the debts and liabilities of the copartnery shall be discharged in whole or as far as the proceeds will go, and the surplus or deficiency, as the case may be, apportioned among and paid to or by the partners according to their respective rights and interests in the copartnery.

The action was conjoined with that of the trustees under Mr. William Neilson's settlement mentioned above, and on the 7th of March, 1884, the Lord Ordinary (Lord Lee) held that the appellant was entitled to have the copartnery and the business thereof now wound up as at the 14th of May, 1883, in such manner as shall be mutually agreed upon, or as shall be fixed by the arbiter named in the draft contract of copartnery.

Against this interlocutor the other partners of the Mossend Iron Company reclaimed, and on the 19th of December, 1884, the First Division of the Court of Session recalled the said interlocutor and found in favour of the respondents (1).

March 2, 4. *Rigby*, Q.C., and *Rawlins*, for the appellant:—

Both by the law of Scotland and England, where a partnership is carried on without a new agreement after the expiration of the term of duration, all the covenants of the original contract, so far as they are consistent with a partnership at will, and with the carrying on of the business, are applicable (2). But clause 12

(1) 12 Court Sess. Cas. 4th Series, 499.

(2) See *Marshall* v. *Marshall*, 26 Jan., 1815; 18 F. C. 173, following Lord Eldon's decision in *Peacock* v. *Peacock*, 17 Nov., 1808; 16 Ves. at p. 50; Erskine 3. 3. 26; 2 Bell's Comm. (7th ed.), 521.

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cannot be said to be applicable to a partnership at will, which this now is. For it is only applicable to the partnership at a definite period of time, and at that moment only, namely, three months before the end of the seven years; which is now passed. The articles of a copartnership cannot be modified to suit the succeeding partnership at will. If, as they stand, they are consistent, they apply; but if not they cannot be applied, for they cannot be then held to have been passively consented to. In *Clark* v. *Leach*, 1863 (1), there was a provision in the original contract that if one partner neglected or refused to attend the business of the partnership, the other might dissolve the partnership by notice; and the partner to whom notice was given was to be considered as quitting the business for the benefit of the other. After the expiration of the partnership term the business was carried on without any express renewal of the articles. The plaintiff charged the other partner with neglect and gave him notice of dissolution, and claimed to purchase his share at a valuation. The defendant partner disputed the right to give such notice, but expressed his willingness to acquiesce in an immediate dissolution on the usual terms of the assets being realized and divided The plaintiff filed a bill to restrain the defendant acting in contravention of the right claimed by the plaintiff, and that the clause was still binding. The Lord Chancellor (Westbury) held, agreeing with the Master of the Rolls, that the clause had no longer any application. He said: "You assume the partners to continue on the same general footing as before, but in the case of a stipulation so special and extraordinary as that in this deed, whereby one of the partners is to have the power, not only of ending the partnership, but of gaining a benefit by so ending it, I think I should be taking up a position unwarranted by any principle and not upheld by any authority were I to hold such a special provision as this was transferred to the new contract, which in point of duration and vinculum of the contract was a contract wholly different."

The Lord Advocate (*Balfour*, Q.C.), and *A. Low*, for the respondents, the Mossend Iron Company. The reference to time is a

(1) 1 D. J. & S. 409.

mere negative reference, that unless something is done before the date specified the law of the contract shall be as declared. But if the stipulation as to three months does not apply, that does not do away with the whole clause.

[EARL OF SELBORNE:—After that time had expired could a partner have demanded to be paid out on these terms?]

Yes, unless the clause is restrained by the negative reference to time, there is no part not applicable. It was quite as reasonable to have a clause for paying out in a contract at will as in a contract of time. It was carried forward by tacit consent, and then came in the three modes of realization. The intention was that the old established business should not be broken up, unless the whole partners desired it.

If a compulsory sale in this case is allowed, the whole benefit accrues to one partner with a very small interest. *Clark* v. *Leach* (1) was a very special case. *Cox* v. *Willoughby* (2), *Essex* v. *Essex* (3), and *King* v. *Chuck* (4) were authorities that when there is a determination to put an end to a partnership at a particular time, and that is postponed, then the provisions of the contract of copartnery are postponed with it.

Haldane (with him *Davey*, S.G.), appeared for the respondents, James Neilson and James Thomson, two trustees of William Neilson, deceased, and asked for costs against the appellant, because he had brought on this appeal against their wish, and apart from two other appeals in the list arising out of the question whether they were partners or not.

[LORD WATSON:—If you had been admitted as partners by the Court below, you would have been represented by the company, if not, this appeal does not affect you.]

EARL OF SELBORNE:—

This is a short, and, in my view, a simple question of construction.

There is no doubt about the law that when there is a partner-

(1) 1 D. J. & S. 409.
(2) 13 Ch. D. 863.
(3) 20 Beav. 442.
(4) 17 Beav. 325.

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ship for a term of years, and it is afterwards, after the expiration of the term, continued at will, the rule, in the absence of contract to the contrary, is, that it may be presumed that the new business is carried on upon the old terms as far as they are applicable to it, and only so far; and as far as the principle is concerned, I do not think there is any discrepancy between any of the authorities. It is not at all necessary to examine into the particular cases in which it has been held that a particular term of a written contract did or did not go into the new and unwritten contract, because every case has turned upon its own particular circumstances and upon the question as applied to the words of the particular instrument, whether the old term was or was not applicable to the new contract.

Now, here we have to consider whether the 12th article of the contract, which was for seven years ending on the 31st of May, 1882, is applicable to the subsequent partnership at will. The proper way to examine that question, as it seems to me, is first to determine what is the true and proper construction of the words of that article as they stand in the written contract and as applicable to the partnership for seven years, ending on the 31st of May, 1882. All must agree that it is a strangely and singularly worded article. In the first place, the commencement of the article which we have to consider is, in any view of the matter, not so happily and clearly expressed as it might have been; and then, secondly, the greater part of the article which follows it deals with alternatives which, if the words introducing them are to receive construction upon any ordinary principles, are placed entirely in the power of the partners themselves, and depend upon the consent of them all. Therefore, those latter portions of the article are immaterial unless (which I do not think) there were found in them anything throwing light upon the construction of the first part. [His Lordship then read the first part of clause 12 given above.]

Now in order to construe that upon sound principles, we must dismiss from our minds entirely the subsequent event of the partnership having expired without anything having been done under this clause, and a new partnership at will having been

formed between the former partners, and this question which we have now to determine, arising as to that new partnership at will. We must find out what the words mean, as they ought to be construed with reference to the original contract in which they are found.

The first thing we see is that there is a definite period mentioned of three months before the termination of that contract. That contract was to terminate on the 31st of May, 1882. The words necessarily mean three months before the 31st of May, 1882. It is said that those words are introduced for a negative purpose—to exclude a particular thing by hypothesis—not to introduce one. I think that is not a sound construction of the words. It is very true that the term is fixed as that at which it is to be ascertained whether a particular thing is to be done or not, but if at that time so ascertained that particular thing has not been done, then and from that time the consequences are to follow for which the clause provides. The fixing of three months would be absolutely nugatory and unofficious if they had nothing to do with the consequences which are to follow. But, to my mind, it is plain that a period of three months before the 31st of May 1882 is fixed for the purpose of introducing the option given to the different members of the partnership (not all), of agreeing to carry on the business at that time—the option for some to continue, and some to go out; well, if that is so, what is the rational construction of the words of time? Why, that the option so given is either to be exercised at the exact period of three months, when the other event is ascertained, or, at all events, within the period of three months measured from that event, and to be exercised during the continuance of that particular partnership which expires on the 31st of May, 1882; and although the words are not skilfully drawn, yet it appears to me that no one having to construe them with reference to the original contract could hesitate for a moment to say that the influence of that definition of time pervades every part of the clause. If at that time there has not been a common consent that all shall carry on the business, it is contemplated that one or more may be desirous of retiring, and that one or more may elect—declare a choice which they have a right to make—to

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continue the business. Now when is that to be done? Why within the time which for that purpose has been fixed, the period of three months next before the termination of the partnership; and if so, the whole operation of the clause is confined within those three months, all of them antecedent to the actual termination of the partnership; and the right, a right that may be of importance to one party or to both—certainly it must be in his own view to the party exercising the option—that right (which is a substantial right—to be paid out upon certain terms) must be ascertained by the exercise of the option during the period of three months. If, as was suggested in the argument, one partner after the three months had begun to run, or upon the day when they did begin to run, no general agreement having been made, says: "Now I wish to go out, and I call upon you to elect whether you will continue or not," it may be that the other partners could say: "We are not obliged to make an immediate election; we postpone that, and reserve to ourselves the right to make it during the whole time that the contract permits us;" but that could only be at the most during the residue of the partnership, commencing from three months before its termination; and if the partnership were actually first terminated, it appears to me that a man then declaring his wish to retire on these terms could not without the will and consent of his co-partners be entitled to be paid out on these particular terms.

If that be so, it is quite plain that it is a provision inapplicable to the subsequent partnership at will, because you never can get those three months in any such subsequent partnership, and there is an end of the case.

I have looked at the judgments of the learned judges in the Court below, and I find, without going minutely into the matter, that the learned Lord Ordinary has, in substance, taken that view of the case; not disguising that, looking to the preponderance of interests as between these partners, he would have been well satisfied to see his way to a different conclusion; but he could not do so, and he took that view which, I believe, we all consider to be correct.

Now, how was the matter dealt with when the case came to the Inner House? Three very learned judges, for whose opinions no

man can have a greater respect than I have, undoubtedly did agree in reversing that judgment; but, when I look to the reasons, I find that one of them (Lord Mure) simply expressed his adhesion to the views of Lord Shand; another, the learned Lord President, agreeing in the same result, absolutely said not a single word about the construction of the particular words of the clause—did not deal with the words at all—did not even address himself to the question of the effect of those words of time upon which your Lordships' opinion so much depends. It cannot be said that Lord Shand did not notice those words; but he said he did not attach importance to them. He says: "I do not, in reference to article 12 of the contract, attach importance to the opening words: 'If three months before the termination of this contract.' It was intended, no doubt, that the parties should consider the matter three months before the expiry of the contract; but I can see no difference in substance as to the rights of the parties if they did not consider it two or three months before the expiry. It would have been all the same had it been three days; and I read the provision as being applicable to the natural termination of the contract." Now, with great respect to the learned judge, I must own that this seems to me to be a very unsatisfactory way of dealing with a question of construction. He does not examine the words. He looks to what he thinks substance—that is to say, thinking that the whole thing applies to the natural termination of the contract. I do not know whether he means after the termination. I suppose he does. Coming to that conclusion, yet not pointing out the mode in which he arrives at it, he rejects as practically inofficious those introductory words, because he thinks if it is to operate at the natural termination of the contract it is wholly immaterial (as certainly it would be) whether the parties do or do not consider the matter two months before the termination, or three months, or three days, or any other time—in fact he attributes no office whatever to those words.

I cannot help thinking it improbable that the learned judge would have passed over those words quite so easily if the question had arisen under the original contract, and if a partner, not having declared his desire to retire or to take the benefit of that

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provision before the contract had expired, claimed the right to do so afterwards. I cannot help suspecting that the matter might have received, in that case, different consideration; but it is manifest that it must be governed now by exactly the same considerations by which it would have been governed in that case.

The result is, that I think the interlocutors appealed from, so far as they relate to the action of the appellant, Hugh Neilson the younger, and to the costs ordered to be paid by him, should be reversed, and I think we should in substance, according to the interlocutor of the Lord Ordinary, but not adopting the whole of his words, declare in that action that the pursuer, Hugh Neilson the younger, is entitled to have the copartnery and the business thereof now wound up as at the 14th of May, 1883, in such way or manner as shall be mutually agreed upon, or as shall be fixed by the arbiter named in the draft contract of copartnery. And I see no reason why we should not adhere to the ordinary rule of giving the successful appellant his costs here and below.

As to the other respondents, who represent the trustees of William Neilson, they appear to me to have entered a gratuitous appearance in a case in which they have no interest, and I think they ought to have no costs.

LORD WATSON:—

I also am of opinion that the interlocutors appealed from, so far as they are brought under review, ought to be reversed.

When the members of a mercantile firm continue to trade as partners after the expiry of their original contract, without making any new agreement, that contract is held in law to be prolonged or renewed, by tacit consent, or, as it is termed in the law of Scotland, by "tacit relocation." The rule obtains in the case of many contracts besides that of partnership; and its legal effect is, that all the stipulations and conditions of the original contract remain in force, in so far as these are not inconsistent with any implied term of the renewed contract. The main distinction between the old contract and the new in the present case consists in this, that the latter is a contract determinable at will. It is an implied term of such a contract that each partner has the right instantly to

dissolve the partnership whenever he thinks proper. The right must, of course, be exercised in bonâ fide, and not for the purpose of deriving an undue advantage from the state of the firm's engagements: but no question of that kind arises here.

The objects which a partner has in view, in exercising his right to dissolve a partnership at will are, in the first place, that he shall be freed from the contract and the liabilities which it involves, and in the second place, that he shall receive payment of his interest in the stock of the copartnery, upon the realization of its assets and the discharge of its liabilities. I think it would be inconsistent with the existence of a proper partnership at will that its members should be restrained from effecting the first of these objects whenever they saw fit. But it is not, in my opinion, inconsistent with the nature of a partnership at will that a member should agree upon its dissolution at any time to receive payment of his share and interest in the shape of a sum of money, to be fixed with reference to a particular balance sheet, without having resort to a legal winding-up, and to leave the other members to carry on the business. Such an arrangement is in reality a mode of winding-up which is not less applicable to a contract at will, than to a contract having a definite term of endurance.

Accordingly it appears to me that there is nothing in the subject-matter of article 12 of the draft contract of 1885 which could make it incapable of application to a contract determinable at will. So far I agree with the reasoning of the Lord President (Inglis) in the Court below. But it does not necessarily follow that the special character of the stipulations contained in article 12 is such that they can be reasonably applied to a contract of that kind. The only stipulations of importance in the present case are to be found in the commencement of article 12. The remainder of the article refers exclusively to a method of winding-up, which may be adopted, with the consent of all the parties concerned, in case of none of the partners choosing to continue the business.

I take the general import of these stipulations to be this, that a partner or partners desirous of a dissolution at the termination

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of the original contract shall, if the other partners elect to continue the business, have a right to retire on payment to him or them of his or their share and interest "as the same shall be ascertained by a balance of the company's books as at the termination of the contract." If a partner is in a position to assert, and does assert, that right he incurs a corresponding obligation to go out on these terms. The right and relative obligation are, however, made subject to this condition: "If three months before the termination of this contract the whole members of the company shall not have agreed to continue to carry on the business thereof," and so forth. What is the true meaning to be attached to these words is, in my opinion, a question of vital importance in the present case.

Lord Shand says (1): "I do not, in reference to article 12 of the contract, attach importance to the opening words, 'if three months before the termination of this contract.' It was intended, no doubt, that the parties should consider the matter three months before the expiry of the contract, but I can see no difference in substance as to the rights of the parties if they did not consider it two or three months before the expiry. It would have been all the same had it been three days, and I read the provision as being applicable to the natural termination of the contract, or if thereafter carried on as a partnership at will, then to its termination by a notice from any of the partners." I should be inclined to agree with these observations, if I were satisfied that the opening words merely imply that the obligation shall attach to the retiring partner, at the termination of the contract, in the event of no agreement having been made three months previously, by all the partners, to continue to carry on the business together. That construction would, however, make the words of the condition mere surplusage, because it is obvious that no partner could have a right or be under an obligation to retire at the termination of the contract who had three months before agreed with his remaining copartners to extend its currency beyond that term. I think a great deal more is implied in these words. They appear to me, when read in the light of the context, to imply that three months at least before the time appointed

(1) 12 Court Sess. Cas. 4th Series, at p. 522.

for the termination of the contract the partners shall then ascertain definitely whether all are agreed to continue the concern, and, in the event of their not being so agreed, that those members who desire to retire shall intimate their resolution before the termination of the contract; and, I am of opinion, that all these things must be done at and during the periods specified, and that they are made a condition precedent of the right of the retiring partner to be paid out in terms of article 12, as well as of the right of the partners electing to continue to insist that he shall retire on these terms.

Is then the appellant bound to retire in terms of article 12? I venture to think that he is not. He gave notice on the 4th of May, 1883, to terminate the copartnership as at that date. In so doing he acted within his powers as member of a firm trading under a contract at will. Nothing had been previously done, by the appellant or his copartners, in compliance with the condition upon which the obligation they seek to enforce against him depends; and I cannot understand how the respondents can bring the appellant within the obligation of article 12, except on the footing that the notice of the 4th of May, 1883, was not duly given.

But I desire to rest my opinion not upon the circumstance that the condition was not observed, but upon the ground that the condition and the rights and obligations arising out of it are totally inapplicable to a contract at will. They have plain reference to a fixed punctum temporis, the termination of the original contract; but how are they to be applied to a contract which has no definite currency? Time is of the essence of the condition, but a contract at will affords no terminus from which it can be measured or computed. I need, however, say no more upon this subject, because I concur in the observations which have been already made by the noble and learned Earl.

I have only to add that I agree with the noble and learned Earl in thinking that the mode of winding up the partnership must be determined by the arbiter, and that it ought not to proceed according to the legal method as concluded for in the summons. Upon the question of expenses I also entirely agree with his Lordship.

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LORD FITZGERALD:—

My Lords, I would willingly have come to a different conclusion, but I have been coerced to say that in my judgment, as in that of the noble and learned Lords who have preceded me, it is impossible upon any reasonable construction of the first article, if it is applicable, to apply it to a partnership at will terminable at a moment's notice. If it terminates by a partner saying, as in words like those put in the case of *Featherstonhaugh* v. *Fenwick* (1), "It is my pleasure on this day to dissolve the partnership," then ipso facto it ceases to exist as a partnership, and the legal results follow unless they are controlled by some article. Even omitting the first article and striking it out altogether, I tried as well as I could to apply the 12th article to a partnership at will, but I found it utterly impracticable; and therefore I feel myself coerced to agree with the judgment which has been proposed.

LORD ASHBOURNE concurred.

Ordered and Adjudged: Interlocutors appealed from reversed so far as they relate to the action of the appellant, Hugh Neilson junior. Declared in that action that the pursuer, Hugh Neilson junior, is entitled to have the copartnery and the business thereof now wound up as at the 4th of May (2), 1883, *in such way or manner as shall be mutually agreed upon or as shall be fixed by the arbiter named in the draft article of copartnership. With that declaration cause remitted to the Court below.*

The appellant to be paid his costs in this House and in the Court below by the respondents, the Mossend Iron Company. The Mossend Iron Company and James Neilson and James Thomson, trustees of William Neilson, to severally repay any costs paid to them by the appellant.

Lords' Journals, March 4, 1886.

Agents for appellant: *Clarke, Rawlins, & Co. for Kidstons,*

(1) 17 Ves. 309.

(2) This date was altered by agreement.

Watson, Turnbull & Co., Glasgow, and H. B. & F. J. Dewar, W.S., Edinburgh.

Agents for respondents, the Mossend Iron Company and another: *Hollams, Son & Coward for Webster, Will, & Ritchie, S.S.C., Edinburgh.*

Agents for respondents, James Neilson and James Thomson (William Neilson's trustees): *Freshfields & Williams for Morton, Neilson, & Smart, W.S., Edinburgh, and Mitchells, Cowan, & Johnston, Glasgow.*

[HOUSE OF LORDS.]

ANDREWS AND ANOTHER . . . . . APPELLANTS;

AND

M'GUFFOG AND ANOTHER . . . . . RESPONDENTS.

Charitable Trust—Commingling of different Funds—Excess of Expenditure over Income—Personal Liability of Trustees—Discretion of the Court—Practice.

Pursuers in an actio popularis in re a public trust have no right to demand a partial decree, which will leave unsettled matters seriously affecting the future administration of the charity.

If trustees of a public charitable trust cannot carry out the main purpose of the trust in the mode the truster has expressed, it is their duty to apply to the Court for directions.

When capital of one trust fund is bonâ fide intermixed by the same trustees with capital of another trust fund, both funds being bequeathed for the same public charity, and an actio popularis is brought, the duty of the Court is to consider what course is best—looking at the whole circumstances—for the interest of the charity; and the Court ought to refuse to give any decision until the whole circumstances to form such final decision is before them, it being within the power of the Court to order either an independent inquiry or the production of further evidence by the parties.

In 1859 James E. left certain sums to A. and B. to found a ragged school in N. S. A. and B. built the school. In 1863 John E., a brother of James E., died, having directed his trustees to hand over to A. and B., as James E.'s trustees, the sum of £7000, and directed that if A. and B. were satisfied the ragged school was sufficiently provided for, they should build and fit up—specifying £500 as the cost—another school adjoining the ragged school, "*in the same style of architecture*," and apply the surplus in maintaining the school as one for middle-class education, the two schools to be called the "E. Institute." In 1866 A. E., sister of the above, died, and by her will left the residue of her estate, about £3000, to A. and B., as James E.'s trustees,

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to be invested, the interest to be applied annually by A. and B. towards the support and maintenance of the ragged school; and should they consider that the funds left by James E. are sufficient for that purpose, to apply the whole or any part of the annual interest in support of the contemplated school for affording superior education. At the time of this last legacy A. and B. had erected and nearly completed the school for superior education, but the accounts had not been all paid, the cost much exceeding £500. The bulk of John E.'s legacy, namely £5500, had been invested on deposit note at 4½ per cent., and payment on account of the new building had been met by overdrafts on the bank. On receipt of A. E.'s legacy A. and B. paid these overdrafts by that legacy.

D. and C. raised this action on the part of the public to have A. and B. declared personally liable to replace on investment A. E.'s £3000. A. and B. pleaded that they had considered all these legacies as forming *one endowment* for the "E. Institute," and no separation was made in the accounts; and that the £3000 was represented by an aliquot part of the £5500 on deposit. It was proved that A. and B. had acted bonâ fide, had not spent more than was necessary on the new building, and that they had handed over the £5500 to the new managers of the school. The Lord Ordinary held A. and B. bound to invest the money. The Second Division recalled that judgment, and dismissed the action simpliciter:—

Held, reversing the decision of the Court below, except as to the recall of the Lord Ordinary's judgment, that A. and B. were entitled to absolvitor as far as the action was directed against them individually; but, secondly, that there not being sufficient evidence before the House, the case must go back to the Court below to determine whether the encroachments which have been made on the capital either of John E.'s or A. E.'s bequest ought to be repaid, or any, and if so to what extent, by accumulation of future income:—

Held, also, that the fact that John E.'s funds were in other hands ought not to form any impediment to these matters being inquired into.

APPEAL from the Second Division of the Court of Session, Scotland. The material facts are fully given in Lord Watson's opinion; and it need only be stated here that this was an action raised by the appellants, as members of the public of Newton Stewart, to have it found that the respondents were *personally liable* to replace a sum of £3000 which they had received from Agnes Ewart's trustees for behoof of the school now known as the Ewart Institute, and which they had expended in paying off a debt on a new wing to the buildings directed to be built by the truster's brother, John Ewart.

The appellants' condescendence was solely directed to Agnes' trust. They pleaded, inter alia,

(6.) The defenders, although well aware of their duty with reference to the

£3000, have never invested the same, and they have not paid nor applied any interest thereon to or for the purposes specified. The fact is that, contrary to their duty and in breach of the trust reposed in them, these defenders have since the receipt of the £3000 grossly mismanaged and misapplied the same; and the result is, prior to the year 1879, the said £3000 was entirely lost.

The respondents in their defences stated:—

(3.) As by the terms of Miss Ewart's settlement it was clearly shewn that her own and her brother John's funds should be applied to the same purpose and in the same way, the defenders did not think it necessary to keep the funds of John Ewart's trust and Agnes Ewart's trust distinct: and as, further, they did not wish to disturb the £5500 investment, which was got under special circumstances, and which was yielding a high rate of interest, they paid the money into their banking account in connection with the high school section of the Ewart Institute—i.e. John's trust—which they had considerably overdrawn, owing to payment of expenses incurred in connection with the creation and fitting up of the schools. From that time down to the date of the transfer to the present governors one account was kept by the trustees of their intromissions with the bequest of both John and Agnes, in the belief that the evident intention of the testators in their settlements warrants them in amalgamating the funds, and dealing with them as a whole. On the 5th of September, 1879, the defenders executed the deed of constitution in favour of the other defenders, and handed over the estate to the governors, which then consisted of the above sum of £5500, and the buildings and furnishings, fittings, walls, &c. If it is to be held that the bequests of John and Agnes be kept separate and distinct from each other, then the said residue of Agnes is included in the said sum of £5500.

(5.) The defenders in their management of the various Ewarts' trusts acted throughout in bonâ fide, and with a view to promote the true intention of the trusters. Owing to their exertions and management, which were gratuitously given, the Ewart Institution is in a most flourishing condition, and the high school successfully supplies a demand for secondary education in Newton Stewart. Even assuming that this view of the reporters is right (namely the report of the committee of the governors, that the capital had been encroached on to the extent of £510 6*s.* 7*d.*), and that as between capital and revenue the former has been encroached on to the extent specified, the defenders maintain that they were justified in so acting during the first few years of the school's existence; and that now that the school is flourishing, it will be quite easy to save out of revenue, and so replace the amount overdrawn from capital.

These statements were not denied by the appellants.

From the proof adduced it appeared the high school was built in the same style of architecture as the ragged school; and from the accounts furnished it cost for building, £1727 13*s.* 2*d.*; finishing and furnishing, &c., £615 14*s.* 11*d.*; for advertising, expense of constitution, &c., £296 16*s.* 6*d.*; and for outside walls, &c., £538 8*s.* 11*d.*; or in all a sum of £3178 13*s.* 6*d.* The factor of

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the trust was also paid out of Agnes' fund £280 for eight years' back fees, &c.

On the 12th of July, 1884, the Lord Ordinary (Fraser) pronounced an interlocutor by which he held that the respondents were bound to invest the sum of £3000 received from Agnes' trustees; the interest to be applied to the maintenance only of the school. On the 27th of May, 1885, the Second Division recalled this interlocutor, holding the respondents had acted perfectly bonâ fide, and were not personally liable; but dismissed the action simpliciter (1).

May 11, 13, 14. *The Solicitor-General for Scotland* (*Asher* Q.C.), and *MacClymont*, for the appellants:—

It was no answer to their case that the respondents might find some means to recoup themselves out of any interest of the trust. Neither will having acted in good faith exonerate them. In *Wiles* v. *Gresham* (2) trustees under a marriage contract were held personally liable for £2000 they had not called up before the husband's bankruptcy, although they had invested another sum under the contract on copyhold land, which had been improved by the husband. The Vice-Chancellor said "When there are two separate funds subject to the trusts, and the trustees commit a breach of trust as to one, by which it is lost," they cannot say "we have improved the other fund, and that fund is bound to make up the loss on the other."

[LORD FITZGERALD:—That is a case of an ordinary trust, this is a public charity.

LORD WATSON:—In the case of a public charitable trust the Court have a power and discretion which does not belong to them in the case of a private trust. The rule is this, that while the Court cannot alter the object of the trust, they may, according to the circumstances of each case, vary the mode of its attainment, although differing from the directions of the truster (3). *Clephane*

(1) 12 Court Sess. Cas. 4th Series, p. 1001.

(2) 2 Drew. 258.

(3) See Lord Romilly, M.R., in *Attorney-General* v. *Sherborne Grammar School*, 18 Beav. at p. 280; *M'Culloch* v. *Kirk Session of Dalry*, (1876), 3 Court Sess. Cas. 4th Series, p. 1182.

v. *Lord Provost of Edinburgh* (1) is a very good illustration of how the Court may use its discretion.]

Sir *H. Davey*, S.G., and *Graham-Murray*, for the respondents:—

The appellants sought to treat Agnes' trust as a distinct and separate trust, and to make the defenders personally liable. But this endowment was *part* of the endowment of the "Ewing Institute;" and all the circumstances of how it had been dealt with, and in connection with the other endowments, must be gone into. And at the most, these trustees could not be personally liable unless it was proved the sum was entirely lost, or had been applied to purposes other than the trust; but neither was found here. No doubt the trustees did spend more than John's will authorized on the high school, but, on the other hand, they were directed to erect that addition to the Ewing Institute in the same style of architecture. Of course trustees who take upon themselves to initiate a scheme run a great risk; but, then, although they depart from the letter of the will, if they carry out the intention, and can satisfy the Court that the expenditure was what the Court itself would have sanctioned, then it is different.

[LORD WATSON:—The usual course is not for the Court to trust to the proof brought before it by each side, but to remit to some person of skill to inform the Court whether what has been done was proper.]

The case of *Wiles* v. *Gresham* (2) does not apply if the trustees spend the money on something the Court would sanction. If this had been a private trust the beneficiaries could not claim the £3000 without allowing for the improvements on the school.

[LORD WATSON mentioned *Monteath's Trustees* v. *Lindsay* (1864) (3).]

There the Lord Justice Clerk held that it was a well established law that where a trustee has invested trust funds in violation of the trust, but has done so in bonâ fide, there is competent to the beneficiary the option either to take the subject the trustee has purchased, or to claim the money so invested with interest. But,

(1) Law Rep. 1 H. L., Sc. 417.
(2) 2 Drew. 258.
(3) Reported July 20, 1864, 36 Scot. Jurist, 701, at pp. 702–3–4.

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then, if the beneficiary elect to take the subject purchased, he must allow for all sums of money expended on it by the trustee in improvements. The respondents had raised in the Court below, by their pleadings, the distinct point whether or not they were warranted in amalgamating John's and Agnes' funds. As to recouping the fund out of residue, the amount is so small that it would be easily done out of the profit of the trust. In *M'Leish Trustees* v. *M'Leish* (1) Lord Medwyn said, it is a "principle of law that in construing trusts for benevolent purposes, a liberal interpretation is to be given, so as to ascertain the true meaning of the testator, and to carry his wishes into effect; and I have no conception that if the trustees, on their own responsibility, borrow money, or lay out a large sum on repairs in any year, they will be bound to make the whole a deduction from the receipts of that year, so far diminishing the payments to the objects of the charity, or that they may not pay off such sums by instalments in subsequent years." It is for this House to hold that the trustees have not done more than was reasonable; or if there was not sufficient material here to decide on a complete scheme, then there should be a remit for further inquiries and the settlement of a permanent scheme.

Sir *H. Davey*, S.G., in reply.

Time having been taken, judgment was delivered as follows:—

LORD WATSON:—

The respondents, William M'Guffog and John M'Gill, are the surviving trustees under the settlement of the late James Ewart, draper, in Newton Stewart, who died in April, 1859. After his death, the respondents and their co-trustee, the deceased John Ewart, a brother of the truster, in compliance with directions contained in the settlement, built a ragged school in Newton Stewart, and set aside funds for its endowment and maintenance. John Ewart, who died in April, 1863, seems to have taken an active interest in the execution of his brother's trust, and in the design and erection of the ragged school buildings.

(1) 25 May, 1841. 3 Court Sess. Cas. 2nd Series, at p. 922.

By his last will and testament, dated the 21st of July, 1862, John Ewart appointed his executors to pay over the sum of £7000 to the trustees of his brother James, to whom he gave power, in the event of their considering that his brother had made sufficient provision for the maintenance of the ragged school, "to apply a part, not exceeding £500, or thereby, of the said sum of £7000, in building and fitting up, in the same style of architecture as the said ragged school, of a school to be erected at the north end of the master's house, already erected or in course of erection, so as to complete the design of the present building, and to apply the interest or annual produce of all or any part of the balance of said sum of £7000 in the maintenance and support of said last-mentioned school, and which school shall be for the affording a superior education to the children of the middle classes, which children shall be bound to pay, and the rector or master shall be entitled to exact, such modified fees as shall be fixed by the trustees of my said brother's settlement." He also directed that, in said event the interest or produce of the balance of the £7000 should be permanently applied "for the improvement of and furthering the said school, and for promoting a higher standard of education in Newton Stewart; and for the efficient repair, cleansing, painting, and decoration of the buildings." James's trustees, being of opinion that sufficient provision had already been made for the ragged school, resolved to devote the whole of John's bequest to the purposes of a secondary school. They accordingly proceeded to build a school-house now known as the high school. The new school was completed in September, 1864, it was shortly afterwards opened, and has ever since been available to all members of the public who may choose to send children there to be instructed. The £7000 was paid over to James's trustees on the 16th of July, 1864.

Agnes Ewart, the sister of James and John, who died in January, 1866, by her trust disposition and settlement, dated the 5th of February, 1863, appointed the residue of her estate to be paid to the trustees of James, with power to them, in the event of their considering that the ragged school was already sufficiently provided for, "to apply the whole or any part of the annual produce or interest of said residue, rest, and remainder of my

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said estate in the maintenance and support of a school which it is in contemplation to erect at the north-east end of the master's house, erected at the north-east end of said ragged school, and which school so contemplated to be erected is to be for the affording of a superior education to the children (male and female) of the middle or higher classes." The trust estate was not finally wound up until the 18th of April, 1883, when the free residue, amounting in all to £3000, was paid over to the respondents as trustees of James, subject to the trusts of Agnes Ewart's settlement. That sum was made up of £2595 18*s.* of principal, and £404 2*s.* of accumulated interest.

The present action was brought by the appellants in January, 1884, and concludes, inter alia, to have it found and declared that the respondents are bound to invest the said sum of £3000 in good securities, and to apply the interest thereof annually towards the support and maintenance of the ragged school or of the high school, and failing production of such securities to have the respondents decerned and ordained to invest, or pay such sum of £3000 in order to its being invested at sight of the Court. The appellants alleged not only that the respondents had failed to invest the money, but that they had grossly mismanaged and misapplied it, and that, in consequence, it had been entirely lost through their gross and culpable negligence.

The Lord Ordinary (Fraser) on the 4th of June, 1884, allowed both parties a proof of their respective averments, which was thereafter taken before his Lordship. The following facts, which it is necessary to keep in view in considering the judgments of the Lord Ordinary and of the Second Division of the Court, appear from the evidence and are not disputed. In erecting and opening the new high school the respondents had paid or incurred liability for (1) £1727 13*s.* 2*d.*, for building the school; (2) £615 14*s.* 11*d.* for finishing, furnishing, &c.; (3) £296 16*s.* 6*d.* for advertising the school, &c., and (4) £538 8*s.* 11*d.* for outside walls, these sums amounting in all to £3178 13*s.* 6*d.* The expenses of administration and maintenance had also been in excess of the annual revenue, and the consequence was that at the time when the residue of Agnes Ewart's estate was paid over, the respondents held an investment of £5500 of John Ewart's

bequest, and had a largely overdrawn account with the National Bank. On receiving the £3000 from the trustees of Agnes, the respondents applied it in payment of the debit balance on that account. It is, in my opinion, proved, and it was assumed by the Lord Ordinary and by the judges of the Second Division, that the sum of £500 mentioned in John Ewart's trust disposition and settlement was altogether insufficient for the erection and fitting up of a school in the same style of architecture as the ragged school so as to complete the design of the existing buildings.

The Lord Ordinary by interlocutor of the 12th of July, 1884, gave the appellants decree in terms of the declaratory conclusions of their summons, and ordained the respondents on or before the first sederunt day in October, 1884, to invest the sum of £3000 in terms of Agnes Ewart's trust. On a reclaiming note, the Second Division recalled his Lordship's interlocutor, and dismissed the action.

The judgments of both Courts, as explained in the opinions delivered by their Lordships, appear to me to proceed on too narrow a view of the scope of the present action. The Lord Ordinary seems to have thought that it was not necessary or even competent to inquire into the details of the respondents' administration of John Ewart's bequest, or to determine anything with respect to that administration. His Lordship, speaking with reference to the replacement of the capital of Agnes Ewart's bequest, says: "How this is to be done is a matter for the consideration of the defenders themselves. The Lord Ordinary does not say that it would be incompetent, by some declaration of trust, to appropriate a part of the bond now held by the managers of the institute for that purpose. Whether this would raise any question as to John Ewart's £5500 is a matter with which we are not concerned in this action." Practically the same view appears to have been taken by the learned judges of the Second Division, who seem to have been of opinion that, in this action no question as to the personal liability of the respondents could be raised or determined. Lord Young, who delivered the judgment of the Inner House, said: "If it is sought by any one having an interest in the matter to make them personally liable, then they must be sued as administering John's trust as well as Agnes' trust; and

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if the proper action is brought against them as persons charged with both sets of funds, under the directions of both deeds, so that the question of personal liability or not can be determined, then the only question which can be usefully decided, or decided with any purpose whatever, or which anybody has a real interest in, would in that way be determined. But that cannot be done here."

The consequence of that restricted view of the limits of the action has been that, without deciding anything as to the administration of John's bequest, the Lord Ordinary has given decree against the respondents for the full amount of £3000, and the judges of the Second Division have dismissed the action simpliciter. In any aspect of the case I think the Lord Ordinary erred in directing the investment of more than £2595 18*s.* the capital sum received by the respondents from Agnes Ewart's estate. Even if the decree had been limited to that sum, the respondents would have been left free, as his Lordship points out, to deal with John's bequest in such manner as to lead to a new litigation, involving the very same questions which have been argued before your Lordships upon the present record. On the other hand, according to the judgment of the Inner House, the appellants must bring a new action before they can obtain any decision with regard to the personal liability of the respondents.

It appears to me to be undesirable that the expenses already incurred in this action should be thrown away, or that a decision should be given which leaves the real questions at issue between these parties to be determined in a new litigation with reference to the administration of John Ewart's bequest. Either of these alternatives might, without benefiting the litigants, prove very prejudicial to the interests of the high school. But I do not think your Lordships are compelled, by the shape of the present action, to adopt one or other of them. It is true that the conclusions of the summons, which are directed against the respondents in their individual as well as their fiduciary character, relate exclusively to the bequest of Agnes Ewart, but the defence stated by the respondents is wholly rested upon their administration of John Ewart's £7000. In my opinion, the statements and pleas put upon the record by the respondents make it competent for the Court to adjudicate upon all matters touching the adminis-

tration of John's trust, so far as may be necessary in order to decide the main question of the respondents' liability, whether as trustees or as individuals, to replace the funds taken by them from Agnes's trust. The balance of John's £7000, under deduction of the cost of building, and the capital sum bequeathed by Agnes, are subject to the same trusts; and if the respondents would have been entitled to apply John's funds to the purposes for which they used the money which they got from Agnes' estate, it would, in my opinion, necessarily follow that they were justified in using her money in order to avoid disturbing an investment which they had already made with John's funds.

There are other reasons for which I am unable to assent to the opinions expressed by the Lord Ordinary in giving judgment. His Lordship appears to me to have dealt with the present case as one depending upon the ordinary rules which govern the liabilities of trustees to beneficiaries under a private trust; and to have overlooked the fact that this is an actio popularis, as well as the distinction which exists in law between the liability of private trustees and that of trustees administering a charitable trust for behoof of the public interested. Both these considerations seem to have been present to the minds of the learned judges of the Second Division, although their Lordships thought themselves precluded, by the form of the action, from giving judicial effect to them. Lord Young expressly states the opinion of the Court to have been that the respondents "acted in good faith and in the honest discharge of their duty, in making the expenditure which they did, and that there were no grounds sufficient to involve them in any personal responsibility."

This is an action in which the appellants have an undoubted title to insist. They do not, however, sue in their own private interest, but in the interest of all members of the public who have, or may have, occasion to avail themselves of the means of education afforded by the high school of Newton Stewart. The Court must, therefore, have exclusive regard to the interest of the general community; and that, in other words, is the interest of the school. The question is not what decree would the appellants be entitled to demand, if they were beneficiaries under a private trust, but what course is, totâ re perspectâ, best for the

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interest of the school. Even if the respondents had been liable for their administration to the same extent as private trustees, I should still have thought that it was not only within the competency, but that it was the duty of the Court, before pronouncing any decree, to consider how far the respondents might be entitled to recoup themselves, by taking, exempli gratia, the furniture of the school, or by accumulating the future income of these bequests, and what effect their so doing might have upon the efficient maintenance of the school. The pursuers, in a case like the present, have, in my opinion, no right to demand a partial decree which will leave unsettled matters seriously affecting the future administration of the trust; and the Court may, in its discretion, refuse to give any decree, until it is enabled to form a judgment upon all such matters.

The rule as to the personal liabilities of charitable trustees for the public was thus expressed by Lord Eldon in *Attorney-General* v. *Corporation of Exeter* (1): "With respect to the general principle on which the Court deals with the trustees of a charity, though it holds a strict hand on them when there is wilful misapplication, it will not press severely upon them when it sees nothing but mistake. It often happens from the nature of the instrument creating the trust that there is great difficulty in determining how the funds of a charity ought to be administered. If the administration of the funds, though mistaken, has been honest and unconnected with any corrupt purpose, the Court, while it directs for the future, refuses to visit with punishment what has been done in the past. To act on any other principle would be to deter all prudent persons from becoming trustees of charities." The principle thus laid down by Lord Eldon does not apply with less force to the circumstances of the present case, because in the case his Lordship was dealing with the funds had been applied to objects which were not within the charity. To expend trust funds upon objects not contemplated by the founder is a much more violent inversion of his trust than to expend them in attaining one of the main objects of the trust, by means which he did not contemplate. In the Scotch case of *Clephane* v. *Lord Provost and Magistrates of Edinburgh* (2)

(1) 2 Russ. 54.

(2) Law Rep. 1 H. L., Sc. 421.

Lord Westbury observed: "Now in both countries (id est, England and Scotland) this principle has prevailed, namely, that there shall be a very enlarged administration of charitable trusts. You look to the charity which is intended to be created, and you distinguish between it and the means which are directed for its accomplishment."

I cannot discover in the words of John Ewart's bequest the least trace of an intention, or even an expectation, on his part that there should be delay in building the high school, or that there should be accumulation of the interest of the £7000, or of any part of it, for the purpose of creating a building fund. He very distinctly prescribes the architectural character of the building which was to be erected, at the same time that he limits the amount to be expended on it to £500. These two directions are now proved to have been absolutely incompatible; evidence was scarcely needed in order to demonstrate that £500 was quite insufficient to meet the cost of the structure which he directed. It might be difficult to determine whether the erection of a high school uniform with the ragged school which he had already built as one of his brother's trustees, or the limitation of its cost to £500, was the leading purpose in the mind of the testator. Had it been necessary to decide the point, I should have been disposed to hold that his main purpose was to complete the Ewart Institute according to the same style in which it had been begun by himself, and that he erred in calculating the cost of its completion. The terms of his will are, to say the least, ambiguous, and I am willing to assume, for the purposes of this case, that the respondents were mistaken in their construction of them. Under the influence of that mistake they proceeded immediately after the testator's death to erect the high school. Had they not done so it is difficult to speculate as to the precise period of time which must have elapsed before the inhabitants of Newton Stewart derived any advantage from his bequest. The income arising from the balance of the £7000 is specially devoted to the maintenance of the school after it has been erected; and the accumulated interest of £500, together with the principal, would probably have been insufficient to build such a school as is directed by the testator, until several generations had passed

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away. The Lord Ordinary suggests that John Ewart looked to the aid of public subscriptions for the erection of the high school "when he subscribed only £500 to that purpose;" but the suggestion is not to be found in John Ewart's will, and it appears to me to be at variance with his wishes and intentions as expressed in that document.

The appellants, in the argument addressed to your Lordships, did not disguise the fact that the present action was brought for the purpose of fixing upon the respondents personal liability for the amount of residue received by them from Agnes Ewart's trustees, leaving them to recoup themselves, to such extent, if any, as they might be found to be entitled, out of John Ewart's bequest. Having regard to the law applicable to charitable trustees in their position, and to the whole circumstances of the case, I agree with Lord Young and the other judges of the Second Division in thinking that no case has been made out for subjecting the respondents to personal liability. Their bona fides is not impeached. The money which they are said to have misapplied has been spent in executing, according to the specific directions of the testator, one of the main purposes of the trust, and the buildings, furniture, and fittings, which represent their capital expenditure, are all in the possession of the trust, and are indispensably necessary for carrying on the work of the high school. The only administrative error which the respondents have committed consists in their having honestly mistaken the mode in which the testator's purpose was meant to be attained. There does not appear to me to be any reasonable ground for supposing that the interests of those classes of the community for whom the high school was to be established have suffered through the respondents' error. They have now had for nearly twenty-two years the benefit of an efficient secondary school, which they would not have enjoyed during that period, nor probably for many years to come, if the respondents had treated the sum of £500, and its accruing interest, as the only fund available for building a school according to the directions of John Ewart's will.

I am, accordingly, of opinion that the respondents ought to be assoilzied from the conclusions of the action, in so far as these

are directed against them in their individual capacity. But there are various questions arising upon the administration of John Ewart's trust, which I think ought, in the interest of the school, to be settled in this action, but which cannot be satisfactorily adjusted with the aid of the evidence before us. It appears to me to be for the consideration of the Court whether the encroachments which have been made on the capital (whether of John or Agnes Ewart's bequest) ought to be repaired to any, and if so to what extent, by accumulation of future income. That will necessarily depend upon the present condition of the high school and its funds, and, to some extent, upon the amount of the fees which the Court may consider it reasonable to exact from scholars. It appears to me that, if your Lordships remit the cause to the Court of Session, the Second Division, before disposing of these matters, may either direct such inquiry as they think proper, or allow the parties to amend their record and adduce further evidence. I do not think it is necessary or expedient to give any special directions in making a remit, as I am satisfied that the Court will rightly exercise their discretion as to the best course to be pursued. Nor do I think the fact that John Ewart's funds are at present in the hands of the managers of the school ought to form any impediment to such matters being inquired into and determined in this action. [His Lordship then moved the judgment given at the end of the report.]

LORD HERSCHELL, L.C.:—

I entirely concur in the conclusions which have been expressed in the opinion of my noble and learned friend. In this action the dealings of the respondents with the fund bequeathed by Agnes Ewart are alone impeached, but I think it is impossible to dispose of the case without having regard to the questions which have been raised as to the disposal of John Ewart's bequest also. The money received by the trustees from the estate of Agnes Ewart was employed in discharging liabilities incurred by the trustees in relation to the school whilst acting under the trust created by John Ewart. At the time the money was received under Agnes' will the trustees had an invested fund of £5500. If the liabilities which the money so received went to discharge

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were lawfully incurred and might properly have been met by using part of this invested fund, I think it cannot be doubted that the trustees would have been perfectly justified in employing Agnes' bequest as they did, treating the invested capital pro tanto as representing it; and this is in fact the defence set up by the respondents. The appellants, however, allege that the liabilities which Agnes' bequest went to discharge were not properly incurred. It therefore becomes essential to investigate the question thus raised. It was alleged by them that looking at John's bequest alone, inasmuch as £500 only was destined for employment upon the completion of the building which he desired to be completed, there ought to have remained £6500 of invested capital. Now there can be no doubt that part of the capital left by John had disappeared through an excess of expenditure on the building over the sum of £500, and part of it in an excess of expenditure on the management of the school beyond the interest derived from the capital sum remaining after the completion of the building.

Now as regards the expenditure upon the building I entirely agree with what my noble and learned friend has said. I think myself that the main object of the testator was the completion of the building in the manner described by him; and I confess that for my part I think that if the expenditure had been limited to £500 and the building had been left uncompleted or only partly finished in the style and manner designated by the testator, the trustees would have been disregarding that which appears to me to have been of the substance of the testator's intention.

As regards the expenses of management, I think the case stands upon a somewhat different footing. There can be no doubt that both John Ewart and Agnes Ewart intended the interest only to be used in the management of the school and the capital to remain as a permanent investment; and I think that the appellants were perfectly justified, having regard to the manner in which the capital had been dealt with for, what I may term, income purposes, in coming to the Court to seek to have the affairs of the institution put upon a sounder footing. But I think the appellants have put their case too high in seeking to impose personal liability upon the respondents; and I think, too,

it is to be regretted that charges of personal misconduct were insisted upon in the pleadings in the action, for which I do not think there is any foundation.

No doubt it may at the outset have been difficult to carry out the declared intention of the testator that the interest only should be expended upon the management of the school, but I think that the trustees erred in making the expenditure they did. It was their duty to administer the trust according to the dispositions of the testator, not to make other dispositions which might seem to them better suited to carry out the main purpose which he had expressed in founding the school; and I think that if it appeared to them that the main purpose could not be efficiently accomplished without departing from the terms of the trust, their proper course was to have come to the Court for a scheme to enable them to depart from the declared intention of the testator so far as was necessary for the purpose of carrying out that main object. But although it might have been better that they should have come, in the first instance, to the Court to sanction what they thought it expedient to do, yet I can entertain no doubt that they acted perfectly honestly and with the very best intentions with regard to the trust which it was left to them to administer. Under those circumstances I think it is impossible to come to the conclusion that the Court should hold them personally liable in respect of the expenditure of the money, although they have departed from the strict letter of the trust.

I entirely concur in the view which has been expressed by my noble and learned friend as to the proper way to deal with this action, namely, by remitting the cause to the Court below to make further inquiries in the sense which he has indicated. There is only one question upon which I perhaps entertain a somewhat stronger view than he has expressed, and that is with regard to replacing so much of the capital as has been expended upon the management of the school as distinguished from what may properly be termed the capital purpose, namely, the erection and completion of the building. I think that in determining how the fund should be dealt with in the future it should be borne in mind that both the testator and the testatrix did intend to establish a permanent endowment and did not intend that the

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capital should be exhausted during the early years of the institution and the school afterwards left unendowed. It appears to me, therefore, that if provision can consistently with the main object of the bequest be made to replace out of the future income the capital which has been expended upon management purposes, it ought to be done. To do it hastily would perhaps cripple the charity, it may be that it can only be done very slowly; but this will be done, having regard to the fees charged, the object of the bequest, and all the other circumstances of the case. Taking all these matters into consideration, I think that the object of the testator to create a permanent fund, the income of which alone was to be applied to the support of the school, should be distinctly kept in view.

I concur in thinking that the interlocutor appealed from should be reversed, with the declaration which my noble and learned friend has stated.

LORD BLACKBURN:—

I also agree in the opinion which has been delivered by my noble and learned friend on my right (Lord Watson), and I think the case should be remitted in the manner which has been proposed. I do not think that I can add anything with advantage to what has been said by the Lord Chancellor and by my noble and learned friend near me as to the mode in which the Court below have to exercise their discretion when the case is remitted to them. I think that probably until they have ascertained the facts and figures it is impossible to say how their discretion should be exercised, and I should therefore prefer to leave the Court, as I understand is proposed, unfettered in the exercise of their discretion until they have ascertained the facts.

LORD FITZGERALD:—

At the close of the argument in this case we had all agreed as to the conclusion to be arrived at, but delayed delivering judgment in order that the decree to be pronounced should be properly expressed by my noble and learned friend (Lord Watson), so as to lessen further litigation and be a guide to the parties.

I entirely concur in the reasons expressed by my noble and learned friend, and in the extent and shape of the order which he has proposed.

LORD ASHBOURNE concurred.

MacClymont applied that their Lordships should direct the costs which the appellants paid pending the appeal should be repaid.

Interlocutor of the Second Division of the Court of Session, dated 27th May, 1885, except in so far as it recalls the Lord Ordinary's interlocutor of 12th July, 1884, reversed:

Declared that the respondents are entitled to absolvitor from the whole conclusions of the action in so far as directed against them individually. Subject to that declaration, cause remitted to the Second Division of the Court of Session to proceed therein as may seem just, with power to determine all questions as to expenses hitherto incurred by the parties in the Court of Session, including power to order repayment of any costs already paid. Appellants and respondents each to bear their own costs of this appeal, these costs not to come out of either John or Agnes Ewart's bequest.

Lords' Journals, 29th June, 1886.

Agent for the appellants: *Andrew Beveridge, for Thomas Carmichael, S.S.C., Edinburgh.*

Agent for the respondents: *John Graham, for J. & J. Milligan, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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LORD ELPHINSTONE . . . . . APPELLANT;

AND

THE MONKLAND IRON AND COAL COMPANY, LIMITED, AND LIQUIDATORS . . . . . RESPONDENTS.

Landlord and Tenant—Assent of Landlord to assign Lease.

When a lease is not assignable without the landlord's assent, the fact that the landlord did not object to the assignees taking possession cannot, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignees.

Penalties, penal and liquidated.

When one lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification; but where the payments stipulated are made proportionate to the extent to which the contractors may fail to implement their obligations, and they are to bear interest from the date of the failure, payments so adjusted with reference to the actual damage are liquidated damages.

Lessees, who had been granted the privilege of placing slag from blast furnaces on land let to them, covenanted (inter alia) to pay the lessor £100 per imperial acre for all land not restored at a particular date:—

Held, reversing the decision of the Court below, that the sum, although described in one part of the agreement, as "the penalty therein stipulated" was not a penalty; but estimated or stipulated damages.

Unassignable Lease—Contingent Damage — Company — Winding-up—Creditor in Liquidation entitled to interdict Dispersion of Assets.

When a limited company is voluntarily wound up a lessor who has granted a lease to the company not assignable without his consent, may obtain an interdict against the liquidator of the company dividing the surplus among the shareholders until some provision to meet his future contingent claims against the company is made.

APPEAL from the Second Division of the Court of Session, Scotland. The facts and material arguments are fully given in Lord Watson's opinion.

On appeal,

May 17, 18, 20, 21. *The Solicitor-General for Scotland* (*Asher*, Q.C.), and *Dundas*, were heard for the appellant (1).

The Lord Advocate (*Balfour*, Q.C.), and *Ure*, were heard for the respondents.

LORD WATSON:—

The respondent company was incorporated in 1872 for the purpose of acquiring the business and works of the Monkland Iron and Steel Company. The assets of the older company included (1) a lease, dated the 8th of March, 1836, for sixty years from Martinmas, 1834, of coal, ironstone, and fire-clay, and other subjects forming part of the estate of Monkland, now belonging to the appellant; (2) a minute of agreement between the appellant's predecessors and the company with regard to certain wayleaves over the Monkland estate, dated the 25th and 27th of April, 1853; (3) a tack to the company of the mill lands of Monkland, for the unexpired term of the mineral lease, dated the 10th and 19th of December, 1855; (4) an agreement between the appellant, the company, and certain trustees for behalf of the creditors of the company, dated the 18th and 21st of November, 1862; and (5) a minute of agreement, dated the 4th, 9th, and 14th of November, 1870, whereby the appellant let to the company, with concurrence of the trustees foresaid, the farms and lands of Petersburn, Peep-o'-day, and others for the period of nineteen years from and after Martinmas, 1870, at a cumulo rent of £640. The Monkland Iron and Steel Company in March, 1875, assigned their whole rights and liabilities under these five deeds of lease and agreement to the respondent company. A sixth minute of agreement was entered into between the appellant and the respondent company dated the 1st of August and 13th of December, 1877, with respect to the deposit of mineral refuse upon the appellant's lands of Monkland and other matters, to which it will be necessary to advert more particularly hereafter.

(1) For cases on the question of penalty or liquidated damages, see Lord Mansfield in *Lowe* v. *Peers* (1768), 2 Burr. at p. 2229; and *post*, p. 348.

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The affairs of the respondent company became embarrassed; and, at an extraordinary meeting held on the 30th of May, 1881, it was resolved that the company should be wound up voluntarily, and the respondents, William Mackinnon and Nathaniel Spens, were appointed liquidators. On the 9th of August, 1881, the liquidators sold, by public roup, the whole property and assets of the company, heritable and moveable, including the company's right and interest in the leases and agreements to which I have already referred, to a gentleman, who subsequently declared that he made the purchase on behalf of a new company, then in course of formation, which was incorporated and registered in September, 1881, as the Monkland Iron Company, Limited. In December, 1881, the respondents executed two formal assignations transferring and making over their whole rights and interests, as tenants or otherwise, and their whole obligations and liabilities, under the six deeds of lease and agreement already specified, to the new company.

On the 1st of July, 1881, the appellant lodged a claim in the liquidation, in which he insisted upon the liability of the respondent company to fulfil all the obligations and liabilities already incurred, or to become prestable to him under these six deeds. The liquidators gave no deliverance upon the claim, but proceeded to pay the creditors of the company; and after settling all claims of debt (other than the appellant's) a considerable sum remained in their hands at the time when this action was raised, on the 29th of October, 1883. Between September, 1881, and October, 1883, there was a good deal of correspondence between the appellant's agents on the one hand, and the respondents and the new company on the other, as to the terms upon which the appellant should recognise the new company as having right by assignation to the leases and agreements in question. These negotiations terminated with an assertion on the part of the respondents and the new company that the respondents had absolute power to assign, and that the appellant had not the option to give or withhold recognition of the new company as tenants in lieu and stead of the respondent company; and the present action was brought in consequence of an intimation made by the liquidators on the 4th of October, 1883, to the effect that,

if no proceedings were taken to interpel them before the 31st of that month, they would distribute the surplus assets among the shareholders of the company.

The leading conclusions of the appellant's summons are for declarator that the respondent company are still liable to fulfil the whole obligations and liabilities attaching to them under the contracts assigned to the new company, and that the liquidators are bound to set aside the whole or so much of the surplus assets as may be required to meet such obligations and liabilities as they become due and prestable. These conclusions are founded upon the allegation that the respondents had no power to assign so as to make the new company the appellant's debtors in these obligations and liabilities without his consent. The Lord Ordinary (Lee), on the 22nd of March, 1884, gave the appellant decree in terms of the declaratory conclusions. The case was then carried by reclaiming note to the Second Division of the Court, who, on the 30th of October, 1884, allowed the parties a proof before answer of their respective averments. The learned judges, at the same time, decided that four of the contracts specified in the summons, viz., the mineral lease of March, 1836, the minute of April, 1853, the mill lands tack of December, 1855, and the agreement of November, 1862, were in terms assignable, and had been lawfully assigned by the respondents. Against that decision, which was given effect to in the subsequent interlocutor of the 27th of May, 1885, no appeal has been taken. The proof allowed was led on the 2nd of December, 1884, before one of the judges of the Division. The case, which was then confined to the agricultural lease of November, 1870, and the minute of August and November, 1877, was again heard along with the proof; and by interlocutor of the 27th of May, 1885, their Lordships recalled the interlocutor of the Lord Ordinary and dismissed the action.

Lord Young, in whose opinion the other judges concurred, was inclined to think that the appellant had accepted the new company as assignees of the contracts embodied in the lease of 1870 and agreement of 1877, and that he could not therefore take action against the respondents. But, inasmuch as he was of opinion that no present debt or liability to the appellant under

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either of these contracts had been averred or proved, his Lordship preferred to abstain from deciding the point, and to leave the appellant to prefer his claims in the liquidation. His Lordship also expressed the opinion that the circumstances of the case did not justify the appellant in resorting to an extraordinary remedy for his security.

I cannot assent to the propriety of the course taken by the learned judges in dismissing the action, and leaving the appellant to renew his claims in the liquidation. The appellant had preferred a claim in the liquidation more than two years before the action was instituted. He had, during the interval, made repeated endeavours to get the liquidators to dispose of the claim, which they declined to do, and ultimately recommended him to take judicial proceedings. It was, in my opinion, inexpedient to send back the appellant, with his claim, to the liquidators, four years after it had been submitted to them. If they had again declined to entertain it, or if they had adjudicated upon it, in accordance with the pleas they now maintain, the appellant would have been under the necessity of raising a fresh action, with conclusions substantially the same with those he now insists in, for the purpose of enforcing what he conceives to be his legal rights. When a limited company is in course of being wound up voluntarily, I do not think a creditor, who is asserting future or even contingent claims against the company, can justly be said to resort to an extraordinary remedy when he seeks to have the liquidators judicially interpelled from dividing the surplus assets among the shareholders without making any provision to meet his claims when they shall arise. I am consequently of opinion that your Lordships ought now to dispose of the case upon its merits.

According to the law of Scotland, the assignation of his lease by a tenant, who has power to assign, has the effect of making the assignee sole tenant from the time he attains possession of the subject of the lease, and of discharging the cedent from future liability to the landlord. When the tenant has no power to assign, the unqualified acceptance of the assignee by the landlord, whether express or implied, has the same effect.

The agricultural lease of November, 1870, the first of the two contracts with which we have to deal, is conceived in favour of

the respondent company as lessees, "but excluding assignees and sub-tenants legal and conventional," these being words which plainly import that the lessees are to have no right either to assign or sub-let without the consent of the lessor. The respondents did not plead that the lease is, suâ naturâ, assignable, but they maintained that the appellant accepted their assignees. It was argued for them, on the authority of *Dobie* v. *Marquis of Lothian* (1) and *Duke of Portland* v. *Baird & Co.* (2), that the fact of the landlord not objecting to the assignees taking possession must, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignees. The point did not arise for decision in either of these cases, and the dicta of the learned judges, when fairly considered, do not appear to me to give the least countenance to the respondents' contention. That a landlord has, by implication, consented to receive an assignee, or has so acted as to bar himself from alleging that he has not consented, must, in my opinion, be matter of inference from the whole circumstances of the case. I can easily conceive that the fact of the landlord having, in the full knowledge of the cedent's actings, refrained from making any objection to the assignee entering into possession, might, in the absence of other evidence, be conclusive; but that is not the kind of case submitted for our decision.

The evidence bearing upon this point is somewhat voluminous, but I have had no difficulty in coming to the conclusion that the appellant has not agreed to receive the new company as his assignees under the lease of 1870, and has done nothing to bar him from pleading the absence of his consent. The respondents appear to me to have been distinctly informed, and to have been, throughout the negotiations which preceded this action, perfectly aware, that the appellant declined to accept the new company as his tenants, except upon the condition, inter alia, that they were to remain liable for the whole prestations stipulated in the lease. It was unquestionably within the right of the appellant to attach that or any other lawful condition to his consent. Of course, the respondents were not bound to submit to such a condition;

(1) 2 Court Sess. Cas. 3rd Series, p. 788.

(2) 4 Court Sess. Cas. 3rd Series, p. 10.

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but they knew, or at least ought to have known, that, if they did not submit to it, they had no power to grant an effectual assignation. His claim, lodged with the liquidators on the 1st of July, 1881, which was all along insisted on by the appellant, was substantially the same claim which is preferred by him in this action. In the negotiations which took place between September, 1881 and October, 1883, the terms of which appear from the correspondence printed in the appendix, the appellant insisted on the respondent company remaining bound to him as a condition of his assenting to receive their assignees, and the negotiations seem to have been mainly protracted by attempts to adjust certain other conditions, also insisted in by the appellant, with reference to the carriage of the new company's traffic by lines on which wayleaves were payable to him. It is, moreover, a significant fact that in the course of the correspondence neither the respondents nor the new company ever suggested that the appellant had, in point of fact, accepted the latter company as his tenants. What they did assert was, that the lease was assignable by the respondents without his consent, an assertion which the appellant persistently disputed. In these circumstances it appears to me that the mere fact that rents were paid to the appellant by the new company is of no consequence. The receipts given for these payments contain no reference to the new company, and no entries or expressions from which his recognition of that company can be reasonably inferred.

The minute of agreement of 1877 stands in a different position from the lease of 1870 in this respect, that it does not contain an express exclusion of assignees. The respondents maintain that the contract of 1877 is in its own nature assignable, to the effect of relieving them from its obligations, so far as these became or may become prestable after the date of the assignation. They also maintain that, if they had not the power to assign, the appellant has nevertheless accepted the new company as his debtors in these obligations, and discharged them of all future liability. That argument rests upon the same evidence of implied consent which was relied on in the case of the lease of 1870, and must, in my opinion, be rejected for the reasons which I have already indicated.

The respondents maintain that the agreement of 1877 has reference to and is ancillary to the mineral lease of 1836, and other contracts which have been found to be validly assigned, and, consequently, that it is of the same quality as regards its assignability. I think that proposition would be well founded in law if the respondents were able to shew that the agreement of 1877 merely added certain terms to these contracts, or effected some modification of the stipulations which they contain. The appellant, on the other hand, maintains that the minute of 1877 consists of a variety of stipulations which are either independent of the subject-matter of these contracts, or are such as (being connected with them) became prestable before they were assigned to the new company.

The minute of 1877 contains in all thirteen articles of contract, some of which must be separately considered, inasmuch as they refer to different matters. The first to the eleventh articles, both inclusive, appear to me to relate to the same subject-matter, viz., the deposit of slag from their blast furnaces by the respondent company upon certain specified portions of the land let to them under the agricultural lease of 1870. The first, second, and third articles define the extent of the privilege; the fourth and fifth prescribe the compensation in money which the company is to pay for the exercise of the privilege; and articles 6 to 11 relate to the mode of making the deposit, and to certain relative works necessary for maintaining accesses, protecting open watercourses, and so forth. It is a point in favour of the respondents' argument that the privilege, although it affects the land let to them by the lease of 1870, is not a privilege useful or available to an agricultural tenant, and that it does not terminate at Martinmas, 1889, the ish of that lease, but is to endure "till the term of Martinmas, 1894, or such earlier date as shall be the termination of the lease of Monkland minerals, under which the second parties are now the tenants of the first party." But it is admitted that none of the slag to which the privilege relates is produced upon land let by the appellant to the company, and it is shewn by the receipts in process, and not disputed, that a very small percentage of the slag actually deposited in pursuance of the privilege was the product of minerals raised from the Monkland estate. It

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does not appear, and was not alleged by the respondents, that the mineral lease, or any other of the contracts libelled, gave them the right to erect blast furnaces, and carry on the manufacture of pig iron, upon the appellant's property, so that, in reality, the privilege was only available to those in right, for the time being, of the respondents' Calderbank works, with which the appellant had no connection whatever. In these circumstances, although the question does not appear to me to be free from difficulty, I am of opinion that these eleven articles are not, in any proper sense, ancillary to the contracts which the respondents had power to assign, and that the respondents, whether it be or be not in their power to communicate the privilege to the new company, cannot assign it to the effect of relieving themselves of the liabilities which they have undertaken to the appellant.

I do not think it necessary to determine whether the contract embodied in the 12th article of the minute was assignable by the respondents, because I am of opinion that the whole obligations therein undertaken by them had become due and prestable, before the new company came into existence. That article professedly modifies certain liabilities of the respondent company, arising under the previous agreement of November, 1862 (which the Court below have held to be well assigned), in reference to the levelling and soiling over of two deposits known as the Peep-o'-day and Brownsburn slag hills. By the 7th article of the agreement of 1862, the mineral tenants became bound to level and soil the surface of the Peep-o'-day deposit, which was then an old slag hill, on or before the 1st of January, 1868. The 8th article empowered them to lay slag from their works at Calderbank upon part of the lands of Brownsburn. By article 11 they undertake to level and soil over the deposit, within twenty years from the 1st of January, 1863, provided the mineral lease should endure for that period, and in the event of its sooner coming to a termination, then within six months thereafter. By the same article it was agreed, that in the event of their failure to complete the levelling and soiling over of the Brownsburn deposit within the time specified, they should pay to the appellant "to enable him to complete the same, a sum of money at the rate of £100 per imperial acre for all land covered with slag, and not

levelled and soiled within the foresaid period, which sum shall be in lieu and full of the second parties obligation under article eighth." The 12th article of the agreement of 1877 extended the time for completing the operation of levelling and soiling the Peep-o'-day deposit, and as regards the Brownsburn deposit limited the time to Whitsunday, 1879. In the case of Peep-o'-day, it provides that, failing performance, the respondent company shall pay to the appellant "at the rate of £100 per imperial acre for all ground not so restored, together with legal interest thereon, from and after the date when the operations should have been completed until paid." In the case of the Brownsburn deposit, which at that time covered the whole area included in the agreement of 1862, it provides that failing completion of soiling over at the term of Whitsunday, 1879, the penalty stipulated in the 11th article of that agreement shall be due and payable. The period fixed for completion of these operations was subsequently extended, in reference to both slag hills, to Whitsunday, 1881.

At the 15th of May, 1881, these slag hills were, to a large extent, neither levelled nor covered with soil; and it does not appear to me to admit of doubt that the money payments, stipulated in article 12 of the agreement of 1877, became, at that date, instantly due to the appellant. But, in the course of the negotiations to which I have already alluded, the agents of the appellant, by letter dated the 11th of November, 1882, agreed that he would not press the respondents for payment, on condition of the new company proceeding to carry on the work of levelling and soiling continuously and satisfactorily, and completing it by Martinmas, 1884, at the latest; and on the further condition that if the new company should fail to do so, all the obligations undertaken by the respondents with reference to pecuniary compensation "shall come into force in the same way as if the term of Martinmas, 1884, had been substituted for Whitsunday, 1881, in the agreements." The new company apparently did something in the way of soiling and levelling; but they admittedly failed to complete the work by Martinmas, 1884. It was pleaded at your Lordships' bar that the appellant thereby accepted the new company as his sole debtors in these obligations. The

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plea, in my opinion, involves no question of power to assign to the new company. The respondents must prove that the appellant consented to the delegation of his overdue debt to the new company; and the terms of the correspondence afford distinct evidence that he did not.

Whilst the present action depended before the Lord Ordinary the term of Martinmas, 1884, had not yet arrived; and the appellant was not in a position to ask decree for the sums due to him under article 12, although the summons contains an appropriate conclusion, and the grounds of the claim (£1,630) are set forth in the condescendence. The proof allowed by the Inner House interlocutor of the 30th of October, 1884, was of the whole averments of parties; and on the 2nd of December the appellant and the respondents both adduced evidence as to the extent of those portions of the slag hills which had not been levelled and soiled, in terms of the agreements, at Martinmas, 1884. The appellant asked the Second Division to give him decree for £1630, or such other sum as their Lordships might fix, and he preferred the same claim on the hearing of this appeal. The Second Division refused to give him decree, on the ground, as explained by Lord Young, that no debt under the agreement had been averred or proved in this action. I should have thought the learned judges were right in so refusing had I been able to concur in their opinion, which is thus expressed by Lord Young:—"The agreement to pay £100 per acre for ground unrestored at a particular date is clearly a penalty under which no more than the actual damage can be recovered." Upon that construction of the agreement the evidence does not afford data for assessing the amount due to the Appellant. But the payments stipulated in the 12th article are, in my opinion, liquidated damages, and not penalties. When a single slump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification. The payments stipulated in article 12 are not of that character; they are made proportionate to the extent to which the respondent company may fail to implement their obliga-

tions, and they are to bear interest from the date of the failure. I can find neither principle nor authority for holding that payments so adjusted by the contracting parties with reference to the actual amount of damage ought to be regarded as penalties. I have examined the evidence on both sides with respect to the condition of the Peep-o'-day and Brownsburn slag hills as at Martinmas, 1884. The testimony given by Mr. Ferrie and Mr. Thomson, on behalf of the respondents, does not appear to me to impeach the accuracy of the measurements made by Mr. Macrae and Mr. McCreath, the appellant's witnesses; and I think your Lordships may, without doing injustice to either party, fix the sum due by the respondents to the appellant, under the 12th article of the agreement of 1877, at £1600.

The 13th article of the minute of 1877 merely alters the consideration prestable by the respondent company in respect of a privilege of wayleave over the appellant's lands of Broadlees. The respondent company assert that the privilege was conferred upon them as tenants, by their mineral leases; and, seeing that the appellant did not allege, and has not proved, anything to the contrary, I think it must be assumed that article 13 is simply a modification of one of the terms of the contract under which they worked the Monkland minerals, and that they had the right to assign it to the new company.

I am accordingly of opinion that the interlocutors of the Second Division appealed from ought to be reversed, except in so far as they recall the Lord Ordinary's interlocutor of the 22nd of March, 1884; that the appellant should have decree for payment of £1600, with interest from Martinmas, 1884, and of declarator that the respondents are bound to fulfil all the liabilities undertaken to him by the respondent company under the lease of 1870 and the agreement of 1877, with the exception of the 13th article of that agreement; and that the respondents William Mackinnon and Nathaniel Spens are bound to set aside the surplus assets of the company, or so much thereof as may be necessary, in order to make due provision for these liabilities. I think the appellant ought to have the costs of this appeal and also the expenses incurred by him in the Court below, from the date of the interlocutor of the Second Division allowing a proof, and that the

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parties ought to bear their own expenses down to and including that date.

LORD HERSCHELL, L.C.:—

I have had the advantage of reading the opinion of my noble and learned friend who has just addressed the House, and I concur entirely in the conclusions at which he has arrived, and the reasoning upon which those conclusions are founded. The case turns for the most part, in my opinion, upon the view to be taken of the facts, and I do not think it necessary to repeat the exhaustive examination of them which is to be found in the opinion just expressed. I shall content myself with adding a few observations upon the points of law which were discussed in the arguments before your Lordships.

I cannot think that the learned judges in the Court below were right in dismissing the action. If any liability to the appellant existed on the part of the respondent company, he was entitled to have provision made for it by the liquidators before the assets of the company were distributed among the shareholders. And I think he was entitled to have it determined in this action whether any such liability did or did not exist.

He had already made application to the liquidators to deal with his claim. This they declined to do, and they in effect invited him to take judicial proceedings in order to obtain an adjudication upon it. The present action was accordingly brought. And I am of opinion that it was not only competent for the Court to determine in this action the rights of the parties, but that they were bound to do so.

There are only two other points upon which I think it necessary to add anything.

It was contended that even if the agricultural lease was not as of right assignable, the appellant had, by permitting possession to be taken by the assignees without objection on his part, accepted the assignees as his obligors. I do not think this contention is sound. Whether assignees have been accepted by the landlord in the place of the assignors must, as it seems to me, be determined as a question of fact upon a review of all the circumstances. The fact that possession has been given to the assignees

with the knowledge of the landlord and without objection on his part is no doubt an important element, but it is not the only element to be taken into consideration. In certain circumstances it might be conclusive. But where the facts shew beyond question that the landlord did not intend to accept the assignees in lieu of their assignors, and so far from leading them to the belief that he did so intend, intimated the contrary intention, I cannot think that the mere absence of objection to the possession of the assignees is conclusive that the landlord has accepted them and discharged the assignors. In support of the respondents' contention the cases of *Dobie* v. *Marquis of Lothian* (1) and *Duke of Portland* v. *Baird* (2) were referred to. But no such point arose for decision in either of those cases. And I do not think the dicta of the learned judges, which must be read in relation to the matters then before them, can have been intended to bear the construction insisted on by the respondents' counsel at your Lordships' bar.

The other point to which I desire to advert is the question whether the provision in the agreement of 1877 that the Respondent company should pay to the appellant £100 per imperial acre for all land covered with slag and not levelled and soiled within the specified period was in the nature of a penalty only or was an agreed assessment of damages.

The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled. There is nothing whatever to shew that the compensation is ordinate or extravagant in relation to the damage sustained. And provision is made that the payment is to bear interest from the date when the obligation is unfulfilled. I know of no authority for holding that a payment agreed to be made under such conditions as these is to be regarded as a penalty only; and I see no sound reason or principle or even convenience for so holding. With deference, therefore, to the learned judges in the Court below, I entertain a clear

(1) 2 Court Sess. Cas. 3rd Series, p. 788.

(2) 4 Court Sess. Cas. 3rd Series, p. 10.

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opinion that the appellant is entitled to insist that he has an existing pecuniary claim against the respondent company of £100 an acre to the extent to which their obligation to level and soil remains unfulfilled. And I agree with my noble and learned friend that this may properly be fixed at £1600. I also concur in the form of the judgment proposed.

LORD BLACKBURN concurred.

LORD FITZGERALD :—

I take leave to express my complete concurrence.

I desire, however, to observe, on the proposition of Lord Young, that "the agreement contained in the 12th article of the agreement of 1877 to pay £100 per acre for ground unrestored at a particular date *is clearly a penalty* under which no more than the actual damage can be recovered," and I am induced to do so as the law of Scotland, which we are now administering, seems in this respect to agree in principle with the law of the rest of the United Kingdom; or it would be more correct to say that the law of Scotland in this respect existed in full force and equitable effect whilst we were struggling against the hard and technical rules of our common law. I am not aware that there is any enactment in force in Scotland corresponding to our statute of 8 & 9 Wm. 3, c. 11, s. 8; nor does the Scotch law seem to have required such aid. We may take it, then, that by the law of Scotland the parties to any contract may fix the damages to result from a breach at a sum estimated as liquidated damages, or they may enforce the performance of the stipulations of the agreement by a penalty.

In the first instance the pursuer is, in case of a breach, entitled to recover the estimated sum as pactional damages irrespective of the actual loss sustained. In the other, the penalty is to cover all the damages actually sustained, but it does not estimate them, and the amount of loss (not, however, exceeding the penalty) is to be ascertained in the ordinary way. In determining the character of these stipulations we endeavour to ascertain what the parties must reasonably be presumed to have intended, having regard to the subject-matter, and certain rules

have been laid down as judicial aids. Thus, in *Astley* v. *Weldon* (1), Mr. Justice Heath said: "Where articles of agreement contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But where it is agreed that if a party do" or (I may add) omit to do a particular thing, "such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." Lord Eldon took part in the judgment in *Astley* v. *Weldon* (1), which has always been considered, so far, to state the rule correctly.

There is an Irish case particularly applicable to the case before us: *Huband* v. *Grattan*. (2) In that case there was a covenant by the grantee with his grantor (who was also the owner of adjoining lands) that he would prostrate and remove a lime-kiln before a certain day, and if not prostrated and removed before that day then the grantee should pay to the plaintiff the sum of £100 for each year during which the lime-kiln should remain, *or a rateable sum for a shorter period.* The action was for a breach in not removing the lime-kiln. Held to be liquidated and ascertained damages, and not a penalty.

In *Rolfe* v. *Peterson* (1772) (3) no reasons are given, but there Lord Camden's decision was reversed. It was a covenant by a lessee not to plough up ancient pasture, and if he does to pay an additional yearly rent of £5 an acre. Breach, ploughing up ten acres. Held, that it was not to be considered as a penalty, but as liquidated satisfaction fixed and agreed upon by the parties, notwithstanding that it was alleged "that the penalty of £5 per acre reserved during the remainder of the term for once ploughing amounted to more than thirty times the value of the inheritance of the ten acres before they were put into a state of cultivation by the respondents"; and although the parties use the words "liquidated damages" or "penalty," though such words are not to be disregarded they are by no means conclusive. Thus, in *Betts* v. *Burch* (4), Bramwell, B., correctly lays it down, "For if the whole agreement is such that the Court can see the sum is a penal sum, it must be so treated; on the other hand, if it is not

(1) 2 Bos. & Pul. 353.
(2) Alcock & Napier, 389.
(3) 2 Bro. P. C. 436.
(4) 4 H. & N. at p. 511.

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a penal sum, it would be incorrect to treat it as a penalty merely because the parties have so called it in the agreement." And so in *Kemble* v. *Farren* (1), where the sum of £1000, the subject of the action, was declared by the agreement to be liquidated damages, and not a penalty or in the nature thereof, it was held to be a penalty; but Tindal, C.J., in the course of his judgment, observes: "We see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum they may agree."

There would be some difficulty in criticising some of the English decisions, and it would not be very profitable. Bramwell, L.J., in *Newman's Case* (2) says: "It seems to me, as I said in *Betts* v. *Burch* (3), that by some good fortune the Courts have, in the majority of cases, gone right without knowing why they did so." There could be no more competent judge. I leave it in his hands.

I am clearly of opinion with my noble and learned friend that the sum of £100 per imperial acre for all ground not restored, though described in one part of the 12th article as "the penalty therein stipulated," is not a penalty, and represents stipulated or estimated damages. It is satisfactory also to be able to make out from the uncontroverted evidence that the sum is not exorbitant or unreasonable.

Lord Halsbury :—

I entirely concur. With regard to the observation made by Lord Bramwell (4), it had reference to cases in which the learned judges apparently decided that at law as distinguished from equity they were entitled to consider penalty as that which was to be enforced in terrorem, without having had called to their attention at all the fact that the Act 8 & 9 William 3, c. 11, existed. It was with reference to that that Lord Bramwell made the not unnatural observation that they had gone right, although they were not aware of the ground upon which at law their judgment could be supported.

Interlocutor of the Second Division of the Court of Session, dated the 27th of May, 1885, *except in*

(1) 6 Bing. at p. 148; 3 M. & P. at p. 441.
(2) 4 Ch. D. at p. 734.
(3) 4 H. & N. at p. 511.
(4) See *Betts* v. *Burch* (1859), 4 H. & N. at p. 511.

so far as it recalls the Lord Ordinary's interlocutor of the 22*nd of March,* 1884, *and also the interlocutor of the said Division, dated the* 20*th of June,* 1885, *be reversed. Declared that the appellant ought to have decree in his favour, decerning and ordaining the respondents to make payment to him of the principal sum of* £1600 *sterling, with interest thereon at the rate of* 5 *per cent. per annum from the term of Martinmas* 1884, *until payment; and to have decree finding and declaring that the respondents, the Monkland Iron and Coal Company, Limited, were, at the time of their going into voluntary liquidation, and still are bound to implement and fulfil to the appellant the whole obligations and liabilities undertaken by the lessees in the lease or minute of agreement libelled, dated the* 4*th,* 9*th, and* 14*th of November,* 1870, *and also the whole obligations and liabilities undertaken by them in the minute of agreement, libelled, dated the* 1*st of August and* 13*th of December,* 1877, *excepting only such obligations and liabilities as are contained in the* 13*th article of the said minute; and also that the respondents William Mackinnon and Nathaniel Spens, as liquidators of the said Monkland Iron and Coal Company, Limited, are bound to make due provision for implementing and fulfilling the foresaid obligations and liabilities, and for that purpose to set aside the surplus assets of the company remaining in their hands at the time when this action was raised, or so much thereof as may be necessary for implementing and fulfilling said obligations and liabilities; and also that the appellant ought to have decree against the respondents for the expenses of process incurred by him in the Court of Session, after the* 30*th of October,* 1884; *that subject to these declarations the cause be remitted to the*

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Second Division of the Court of Session; and that the respondents do pay to the appellant his costs of this appeal.

Lords' Journals, 29th June, 1886.

Agent for appellant: *W. A. Loch, for Dundas & Wilson, C.S., Edinburgh.*

Agents for respondents: *Grahames, Currey & Spens, for Mackenzie, Innes & Logan, W.S., Edinburgh.*

[HOUSE OF LORDS.]

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SEATH & CO. . . . . APPELLANTS;

AND

MOORE . . . . . RESPONDENT.

Scotch Law—Sale of Goods—Bankruptcy of Manufacturer—Right of Trustee to Articles in course of manufacture—Mercantile Law Amendment (Scotland) Act, s. 1.

The Mercantile Law Amendment (Scotland) Act (19 & 20 Vict. c. 60), s. 1—which provides that, "Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belong to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing the delivery of the same"—imposes no limitation upon the right of the seller's creditor or trustee until the contract of sale is so far completed as to confer a proper jus ad rem upon the purchaser.

By LORD WATSON:—The same circumstances which in England sustain the inference that a chattel has been "sold" to the effect of passing its property to the vendee, will, in Scotland, generally be sufficient to give him a jus ad rem under 19 & 20 Vict. c. 60, s. 1.

Woods v. *Russell* (except as to the rudder and cordage) (5 B. & Al. 942); *Clarke* v. *Spence* (4 Ad. & E. 448); *Wood* v. *Bell* (5 E. & B. 772, and 6 E. & B. 355)) approved.

The principles applicable to the sale of part of a ship are equally applicable to the sale of part of any corpus manufactum in course of construction. And it follows that it is competent for parties to agree for a valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has reached a certain stage; but it

is a question of construction in each case at what stage the property shall pass; and a question of fact whether that stage has been reached.

On the other hand, materials provided by the builders as portions of the fabrics, whether wholly or partially finished, cannot be regarded as appropriated to the contract, or as "sold," unless they have been "affixed," or in a reasonable sense made part of the corpus. *Wood* v. *Bell* (6 E. & B. 355) and *Tripp* v. *Armitage* (4 M. & W. 687) approved.

APPEAL from the Second Division of the Court of Session, Scotland.

T. B. Seath & Co., the appellants, are shipbuilders in Glasgow. The respondent is the trustee on the sequestrated estate of A. Campbell & Son, engineers, Glasgow. The appellants contracted with their customers for building vessels completely equipped and ready for sea; and as they did not construct or fit up engines and relative machinery, their habit was to contract with engineers to supply whatever engines, boilers, and machinery was required for the vessels built by them. For many years the appellants have entered into such contracts with A. Campbell & Son.

Five contracts were running at the date of Campbell & Son's sequestration on the 12th May, 1883: and this action was raised by the appellants for delivery of pieces of machinery in a more or less finished condition, and materials obtained for such machinery, but lying loose on the bankrupt's premises.

The first contract (the *Elms*) is contained in an offer, dated the 2nd of September, 1881, addressed by A. Campbell & Son to the pursuers and accepted by them. In this Campbell & Son undertook "to furnish you with tandem machinery consisting of high-pressure cylinder 18 in. by 20 in., low-pressure cylinder 36 in. by 20 in., all fitted same as in engine No. 176; boiler 9 ft. 6 in. diameter," &c., . . . "for the sum of £1300 net cost, in terms of your letter of 1st Sept."

Before the 1st of December, 1882, four instalments were paid, amounting to £1250, and afterwards other sums, making the total £1700. There was no obligation to pay by instalments, and no stipulation on an instalment being paid the property should pass to the pursuers.

The construction of the engines and machinery was practically finished, but the whole engine and machinery so far as fitted

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together, and the material provided for the completion, with the exception of a few articles were lying on the bankrupt's premises, and the whole have been valued by the parties at £1400.

The second contract (the *Brighton*) is contained in a minute of agreement dated the 16th of March, 1882, by which A. Campbell & Son undertook "to supply and fit up engines, boilers, and other machinery and appurtenances," for a vessel called the *Brighton*, which Seath & Co. had undertaken to build for the Port Jackson Steamship Company. The sub-contract was made subject to all the conditions of the principal contract, so far as applicable to the supplying and fitting up of the said machinery, &c. The price of the engines was to be £6300, to be paid by four equal instalments as follows—viz., the first "when cylinders, sole-plates, and condensers are cast; the second, when the machinery tooled and boilers ready for rivetting; the third, when the engines, boilers, and machinery are all ready alongside for lifting on board; and the fourth, when all completed and tried to the satisfaction of the owners, and ready for delivery." The instalments were not paid as the different stages of the work were reached, but when Campbell & Son required an advance. They advanced, prior to the 1st of December, 1882, a sum of £3750 in eight separate instalments, and subsequent to that date a further sum of £2000 in four instalments.

The construction of the engines and machinery had been completed and the same delivered, with the exception of a few articles, which had been retained by the bankrupts, and were on their premises at the date of their sequestration, the value of those articles retained was put at £48 17*s.* 8*d.*

The third contract (the *Satanella*) is contained in an offer of Campbell & Son, dated the 16th of August, 1882, to "remove present boiler" from a steamer called the *Satanella*, "construct and fit on board a new boiler of sufficient capacity to supply steam at a regular working pressure of 60 lbs. per square inch, making all requisite alterations and connections in engine-room, converting machinery to work as surface condensing, fitting a complete set of air and circulating pumps and condensers, with brass tubes to each engine, making them to work independently, but it is understood we are to work in all the suitable boiler and

engine mountings, donkeys, cocks, pipes or valves, and if we require to furnish new mountings, &c., as above, the old to become our property, making all complete and sufficient to secure Board of Trade passenger certificate, same as now granted, to be for the slump sum of £600, payments to be made as follows: one-third by bill of four months when boiler is on board, balance by four months' bill when complete. Bills to be renewed, if desired." Interest at the rate of 5 per cent. per annum in lieu of discount being payable by the granters. Two instalments of the bill amounting to £400 appears to have been paid on the 13th of January, and on the 2nd of March, 1883.

The construction of the new boiler and machinery had been largely advanced towards completion, but the boiler and machinery, so far as fitted together, and the whole material, so far as provided for the completion, were lying in the bankrupt's premises and has been valued by the parties at £250. The old material was for the most part returned to the appellants.

The fourth contract is contained in an offer dated the 13th of September, 1882, addressed by Campbell & Son to the pursuer, and accepted by them on the 15th of September, 1882. By this Campbell & Son offered "to make for you and fit on board new tender for Trinity Board two tandem engines on twin principles with high pressure cylinder, &c., all as set forth in specification shewn us, for the sum of £2110."

Two instalments of the price were paid, amounting to £700, on the 10th of February, and the 10th of March, 1883.

Considerable progress had been made with the completion of the contract, but the whole engines, and machinery and material, so far as provided for the completion, were lying in the bankrupt's premises, and have been valued by the parties at £700.

The fifth contract was called the *Bonnie Princess* contract. It appears that the appellant had built for the Liverpool Llandudno and Welsh Coast Steamship Company a steamer called the *Bonnie Princess*, the engines of which had been furnished by A. Campbell & Son, under a sub-contract with the appellants. The company were dissatisfied with the vessel. The dispute was settled by an agreement of the 20th of October, 1882, whereby the appellants agreed to remove the boilers then in the ship, and

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replace them with two upright tubular boilers in accordance with the requirements of the Board of Trade, and should make other alterations; that the Liverpool company should pay as their proportion of the cost of the alterations, £1500, by three equal instalments, by bills at two, three, and four months, after receiving a report from two engineers that the machinery was working perfectly satisfactorily.

These obligations, except as to some alterations within the shipbuilders' department, were taken over by Campbell & Son under an agreement dated the 1st of December, 1882, on condition that they should receive payment of the whole sum stipulated to be paid by the Liverpool company on the conditions therein stated; but that the appellants should have a lien thereon for any sums which might be due by Campbell & Son to them.

Under this contract the appellants had advanced £1375 in three instalments.

The construction of the boilers and machinery had been about three-fourths completed; but the boilers, so far as fitted together, and the whole material were lying in the bankrupt's premises, and have been valued by the parties at £1900.

Besides the sums of £1700, £5750, £400, £700, and £1375, the appellants had paid the bankrupt prior to his sequestration five sums amounting in all to £1350, to account of the sums due under the contracts, but not allocated to any particular contract. The total contract price under the five contracts was £12,310, and the total sums paid £11,275.

The *Brighton* contract had been implemented, except for claims for defective speed and delay, questions which do not arise in this appeal, and articles valued at £48 17*s.* 8*d.* The value of the engines and machinery for the other four contracts, so far as constructed, and of the materials prepared for their construction, and claimed by the appellants, is about £4200. The progress of the work under each contract is fully given in the opinion of Lord Watson.

On the 1st of December, 1882, Campbell & Son signed the following agreement letter, which was accepted by Seath & Co.:—

We, A. Campbell & Son, engineers and boiler-makers, Cheapside Street, Glasgow, considering that we have entered into contracts with T. B. Seath &

Co., shipbuilders and engineers, Glasgow and Rutherglen, for the making, supplying, and fitting-up of engines, boilers, and other machinery and appurtenances for and in sundry steam vessels constructed by them, in some cases without certain stipulations being expressed with reference thereto, and we have been requested and have agreed to grant these presents: Therefore we do hereby express and agree that the following general conditions shall have effect with reference to all contracts or agreements, verbal or written, already made and current, or which may be hereafter made between us and the said T. B. Seath & Co. for the supplying and fitting-up of engines, boilers, and other machinery and appurtenances for and in any steam vessel constructed and to be constructed by them, so far as not inconsistent with any special stipulation in any such contract or agreement, and without prejudice to the rights and remedies otherwise competent by law to the said T. B. Seath & Co., viz.:—

First. That the said T. B. Seath & Co., by the partners thereof, or either of them, or any other party to be appointed by them, shall at all times have free access to our premises for the purpose of inspecting the work of any such contract, and the whole work and material of any such contract shall be subject to the approval of the said T. B. Seath & Co., or of their representative.

Second. That, upon a payment being made on account of any such contract, the portions of the subject thereof, so far as constructed, and all materials laid down for the purpose of constructing the same, shall become, and be held as being, the absolute property of the said T. B. Seath & Co., subject only to our lien for payment of the price on any balance thereof that may remain due to us.

Third. In the event of our becoming bankrupt or insolvent, or failing from any cause whatsoever to proceed with due diligence in the execution of the work of any such contract, the said T. B. Seath & Co. shall have power and be entitled not only to take possession of the portion executed, and of all materials laid down and obtained by us for the construction thereof, but shall also be entitled, if deemed proper by them, with a view to the completion of the work of such contract, to enter upon, use, and occupy our premises, and thereto and thereat use our plant, tools, machinery, and other implements, for the purpose of so completing the work of such contract, and to cause the necessary work to be executed and completed by any person or persons whom they may seem fit to employ, and to pay to such person or persons such reasonable sum or sums as he or they shall think proper, which shall form a claim against us, and which we shall pay forthwith, or allow to be deducted from the price of the work of such contract, if any be due.

Fourth. That we undertake the risk of any damage or loss occasioned to the work of any such contract, until completed and delivered; and further, and without prejudice thereto, keep the work of any such contract, until completed and delivered by us, insured against loss by fire to an adequate amount in name of the said T. B. Seath & Co., and, failing our doing so, they shall be entitled (although not bound) to do so themselves and charge the premiums payable therefor to us.

Fifth. That in the event of the said T. B. Seath & Co. having made, or hereafter making, payments to us in advance, or in excess of what may be due to us at the time, whether on account of any particular contract, or generally, they shall be entitled to impute such excess or advance payments against the work of any of the contracts they may think proper.

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The respondent having refused to deliver the machinery and materials relative to the above contracts, the appellants raised this action in the form of a declarator to have it declared, that they were entitled at the date of the sequestration as proprietors of the "whole materials and others" named, lying in the bankrupt's premises. The appellants' summons enumerated the various articles and materials for the completion of each contract.

The pursuers averred the whole of the contracts were contracts of purchase and sale by which the pursuers agreed to buy, and the Messrs. Campbell to sell, the machinery therein mentioned. In the case of all the contracts, even where the particular dates for the payment of the instalments, as fixed by the contracts, were after the completion of the work, or where no instalments were expressly stipulated for, the pursuers, in point of fact, paid Messrs. Campbell & Son instalments during the work.

They alleged they did this in reliance on a custom of trade observed by shipbuilders and engineers on the Clyde, by which custom the price of such engines and boilers are payable by instalments as the work progresses, and the engines, boilers, and machinery, so far as constructed, and the materials provided for carrying it on from time to time, by or from the commencement of the work, or, at least, after payment of an instalment on account of the price, become the property of the purchasers, though undelivered or lying in the works of the engineer, subject only to the seller's lien for such part of the price as remains due. But it was admitted at the bar that the evidence did not support there being such a custom.

The defendant explained (answer 3) that all the contracts only entitled the bankrupts to full payment on completion of each job, and on the machinery being fitted into the ship, or being certified to work in the manner specified in each contract.

The respondent in his statement of facts averred, inter alia, the main cause of the insolvency of the bankrupts was the low rates which they were allowed by the pursuers for their work. The bankrupts are believed to have had a balance of assets over liabilities in August, 1881, amounting to £1500 or thereby. (2.) The bankrupts were insolvent by the month of June, 1882,

and the excess of their liabilities over their assets increased thereafter continually to the date of their sequestration. In November, 1882, by which time the bankrupts should have stopped business, their liabilities were £8439, and the deficiency of assets did not exceed £4200. The insolvent state of the bankrupts' affairs from June, 1882, was known to the pursuers at and from the said date, and particularly in November, 1882. (4.) "The letter of the 1st of December, 1882, was granted by the bankrupts, and was written by the pursuers after the insolvency was known to both parties, and in fraud and to the hurt and prejudice of the bankrupts' general creditors."

The following admissions, inter alia, were signed by the parties:—

The defender admits that at the time when the works and materials specified in the said inventories (1) were manufactured, or being manufactured, and down to the date of stoppage, it was the intention of the bankrupts that the same should be applied to the contracts under which the same are respectively classified in the said inventories, but he does not admit that the same were "fitted," or then in a state capable of being "fitted," or that the same were absolutely and finally appropriated and destined to the said respective contracts, so as to render it incompetent for the bankrupts to use the same for any other purpose, and to substitute other works and materials therefor. . . . That the whole articles and materials set out in the inventories contained in the summons, with the exception of those in branch second of the third inventory and branch second of the fifth inventory, have been finished, worked up, and employed by the pursuers, along with other articles subsequently acquired by them, in completing the various contracts for which the articles and materials in question are respectively alleged in the condescendence to have been provided or manufactured. That all this has been done under agreement between the parties, and under express reservation of, and without prejudice to, the respective rights and pleas of parties, and of all questions at issue in this action.

In the proof allowed, Mr. T. B. Seath said:—

When a payment was made Mr. Campbell either called or sent a note, saying he wanted money, and would I give him so and so. He (witness) had a very good general idea of the work that was going on, and in allocating the sums paid had to use a wise discretion, or at all events a discretion, in thinking that this contract was so far advanced, and that contract so far advanced, and allocate the sums accordingly. The payments were not made at the time against a particular contract; sometimes a sum of £500 which was paid might

(1) These inventories were elaborate statements of the progress of each article.

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be placed against two or three contracts. The allocation of the sums to the different contracts was done as near as possible at the time the payments were made, and perhaps at the very time. The allocation shewn in their books, of the payments to the different ships, might not be made at the time, but it would be made within a few days of the time. The allocation was sometimes made by Mr. Campbell, and sometimes by witness.

In cross-examination he said:—

Whether instalments were stipulated or not their practice was to pay them money. They paid them money without regard to whether an instalment under a particular contract was due. Being asked did he always ascertain that work had been done to the amount of the payment asked before he made the payment? He said it is a very difficult matter to ascertain whether work is done in a shipbuilding or engineering yard to the amount that you are to pay or receive; but to the best of his judgment he regulated the payments in accordance with the amount of work done. Latterly they did make them advances in excess of what they had done work for.

Mr. Campbell, on being examined, was shewn a letter from A. Campbell, jun., to Mr. Seath, dated the 24th of November, 1882, inter alia, as follows:—

I am sorry that I need to trouble you so often about money matters. I have been wishing for a day or two back to have a talk over this subject, but could not find opportunity. I subjoin my acceptances for what comes due this month, and which I cannot renew.

I would like if you would look into this state of matters, and if, as Mr. Steel once proposed for security, a bill of sale on my plant would be sufficient guarantee, it be arranged if agreeable.

Mr. Campbell continuing, said that:—

The anxiety which he expressed in that letter to see Mr. Seath was about the subject of his pressing necessities. He submitted to him in that letter the state of his acceptances—bills accepted by witness which were coming due in the month of December, and which he could neither meet nor renew. If Mr. Seath had not advanced money to him then he would have had to suspend payment.

The contract as regards the *Brighton* was carried out under inspection; but, generally speaking, the contracts were not inspected while they were in progress. The contract price in the case of the *Brighton* was £6300, and the cost of doing the work was £10,438.

On the 8th of April, 1884, the Lord Ordinary assoilzied the respondent from the conclusions of the summons (1).

(1) As to the first contract the LORD ORDINARY said:—

So far as the pursuers' case depends upon the terms of this contract alone, the Lord Ordinary cannot see that it made them proprietors of the materials provided by A. Campbell & Son for the execution of the contract, and lying, undelivered, in their premises at the date of their sequestration. The

Subsequent to this interlocutor, it was agreed between the parties that several articles should be given up to Seath & Co.

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contract was not a contract of sale, habile to convey a jus ad rem, as regards any of the articles. There was no price fixed for the engines and machinery. The £1800 was to be paid for furnishing and fitting up the engines and machinery. The fitting up is a material element of the contract, and, it is stated, would in this case have cost from £300 to £400, and there is no price fixed for the engines and machinery apart from the fitting up. The distinction between such a contract and a contract of sale, is thus stated by Mr. Benjamin in his book on Sales (p. 102):—"Where a contract is made for furnishing a machine, or a moveable thing of any kind, and fixing it to the freehold, it is not a contract for the sale of goods. In such contracts the intention plainly is, not to make a sale of moveables, but to make improvements on the real property, and the consideration to be paid to the workman is not for a transfer of chattels, but for work and labour done, and materials furnished, in adding something to the land. And the same rule applies when the substance of the contract is to make improvements to a chattel already in existence, e.g., to make and fix boilers to a ship: *Anglo-Egyptian Navigation Co.* v. *Rennie* (Law Rep. 10 C. P. 271 and 571)." The Lord Ordinary was referred to the recent case of *M'Bain* v. *Wallace* (6 App. Cas. 588; 8 Court Sess. Cas. 4th Series, 360, in H. L. 106), but he does not think it applies to this case. In that case there was a completed contract of sale of a specific article for an agreed-on price, of which the buyer was entitled to enforce delivery, and which, therefore, fell within the 1st section of the Mercantile Amendment Act.

Further, there was in the contract now in question no obligation by the pursuers to pay by instalments, and no stipulation that on an instalment being paid the property should pass to the pursuers.

It is said, however, that by the custom of trade in the locality, when a contract for the construction of engines and machinery is silent, as in this case, as to instalments, it is understood that payment shall be made by instalments; and that, on the payment of an instalment, the property passes to the buyer.

But the Lord Ordinary is of opinion that it has not been proved that there is any uniform usage to that effect, such as the Court can recognise; and he further thinks that, even if the existence of an understanding that such a payment would pass the property was proved, it would be irrelevant if the law was otherwise. It would just amount to a mistaken notion of the law: *Anderson* v. *M'Call* (4 Court Sess. Cas. 3rd Series, 765); and the Lord Ordinary did not admit the evidence for any such purpose, but as bearing on the state of Mr. Seath's mind, in reference to the question of fraud raised in the case.

As to the second contract:—

Although there was an obligation to pay instalments at four specified periods, the pursuers, in point of fact, did not adhere to this; but, in accordance with their usual course of dealing with A. Campbell & Son, advanced money to them when they required it. They seem to have advanced, prior to the 1st of December, 1882, a sum of

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On the 9th of December, 1884, the Second Division of the Court of Session adhered, subject to the above agreement (1).

£3750 in eight separate instalments, and, subsequent to that date, a further sum of £2000 in four instalments.

If the Lord Ordinary is right in the views he has expressed as to the first contract, they appear to apply equally to this contract.

The contract is to supply and fit up engines, boilers, and machinery,—that is a locatio operarum, and not a contract of sale. It does not appear to the Lord Ordinary that the fact that payments to account of the contract price were from time to time made, can have the effect of converting this contract into a contract of sale of the articles then in A. Campbell & Son's yard for the purposes of the contract, so as to entitle the pursuers to demand immediate delivery thereof.

As to the third, fourth, and fifth contracts, he was also of opinion that the appellants had no claim.

As to the agreement of the 1st of December, 1882, his Lordship said:—

The agreement is challenged by the defender; but assuming it to be valid and binding, the first question is, Whether the meaning of the agreement was, that the pursuers, by making a payment to account of a contract, became purchasers of the materials, provided for the contract, then in the yard, so as to admit of the application of the 1st section of the Mercantile Law Amendment Act; or, whether the true meaning and intention of the agreement was not merely to give the pursuers security for their advances over the materials in A. Campbell & Son's yard. The section of the Act appears to the Lord Ordinary to apply to the case where there is a completed contract for the purchase of a completed article or articles, or, at least, where the purchaser has acquired a jus ad rem specificam, but has not got delivery: *M'Meekin* v. *Ross* (4 Court Sess. Cas., 4th Series, 154). According to this agreement, however, the payment which is to operate as a transference of the property of the articles, need bear no relation whatever to the value of the articles; nor is the payment meant to be the price, because the agreement goes on to say that the articles are to be held subject to A. Campbell & Son's lien for payment of the price.

It appears to the Lord Ordinary to be impossible to say, in this case, that it was the intention of parties under the agreement that the pursuers, upon making a payment of any amount, however small, to account of a contract, should be forthwith entitled to enforce delivery of the portions of the subject thereof, so far as constructed, and all materials laid down for the purpose of constructing the same. Yet if the articles had been sold, but only not delivered in the sense of the Mercantile Law Amendment Act, that would have been the pursuers' right. No doubt A. Campbell & Son had a lien over them for the price, but as no price was ever fixed for the materials, but only for the completed job, the Lord Ordinary does not see, in the pursuers' view of the case, how that difficulty is to be met.

But the question remains whether, apart from the Mercantile Law Amendment Act, the pursuers are entitled

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(1) 12 Court Sess. Cases, 4th Series, 260.

On appeal,

Feb. 1, 2, 4. *H. Davey*, Q.C., and *Dickson*, (with them *Greig*,) for the appellant:—

Admitting that there was no custom of trade, to the effect of passing the property when instalments are paid: yet that course

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to the property of the articles in question? and the Lord Ordinary was referred to the cases of *Simpson* v. *Duncanson* (Mor. Dict. 14,204) and *M'Bain* (6 App. Cas. 588). But again there is the difficulty that there is no contract of sale in this case; but, assuming that the articles are to be considered as having been sold to the pursuers, but not delivered, then by the law of Scotland the property in moveables does not pass without delivery. It is said that the case of Simpson shews that, in the case of a ship in a shipbuilding yard, where the price is payable by instalments, the property passes to the buyer, and it is said that the same principle ought to be extended to engines and machinery. But the case is undoubtedly exceptional. It has never been extended beyond the case of a ship on the stocks, and the Lord Ordinary sees no reason why it should be extended to the case of engines and machinery.

On the whole matter it appears to the Lord Ordinary that the object of the agreement of the 1st of December, 1882, was to endeavour to obtain security for advances to be made by the pursuers over moveable articles, the property and in the possession of A. Campbell & Son. But that is contrary to the law of Scotland, and a mere agreement between the parties, that the property should be held as transferred, cannot affect the rights of third parties.

The other question remains, whether the agreement of the 1st of December 1882, is valid, and can receive effect in a question with the creditors of A. Campbell & Son. In the view which the Lord Ordinary takes of the case it is unnecessary to determine this, because he does not think that they were prejudiced thereby. But if he is wrong in this view, and if the agreement is to be held to give the pursuers a right to the articles in question, which they would not otherwise have, it may be right that he should shortly state his views as to the validity of the agreement.

It appears to the Lord Ordinary that the evidence clearly shews that A. Campbell & Son were insolvent at the date of the agreement—not only in the sense that they could not meet their liabilities then coming due, but also that they could not have paid 20s. in the pound, if their whole assets had been realised; and he thinks further that, as far as could be foreseen, there was no reasonable probability that they would improve their position, if they continued to carry on their business.

As regards the pursuers' knowledge of their position I think the evidence clearly shews that they knew that A. Campbell & Son could not go on, unless they got immediate assistance from them; and that they were, in fact, entirely dependent on them.

The pursuers had before them the state of the firm's affairs which had been furnished to them, and which, no doubt, shewed a surplus of assets of £18; but they had also before them the statement contained in A. Camp-

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of dealing shewed the intention; and when a payment was made it was equivalent to it being stipulated in the contract.

No doubt by the law of Scotland there must be delivery, but by sect. 1 of the Act of 1856 the purchaser, notwithstanding the rights of creditors, could allege and enforce his jus ad rem to the specific goods he had purchased. Alternatively, apart from the statute, by the law of Scotland the work executed under each contract so far as then completed vested in the purchaser and became his property when an instalment of the price was paid. Here, at least, one of the agreements was to pay by instalments as the work reached a certain stage, and in the other contracts instalments were—as a matter of fact and in accordance with the parties' usual course of dealing—paid as the work proceeded.

In *Simpson* v. *Duncanson* (1)—the case of a ship—it was held that where instalments are agreed to be paid at certain stages as the work progresses, the property passes on payment of an instalment, and that principle ought to be extended to machinery.

[LORD WATSON:—It is obvious the reporter of that case did not give us all the facts.] (2)

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bell & Son's letter of the 24th of November, which shewed that there was at least a liability of £375 for wages, which had to be paid on the 2nd of December, not included in the state of affairs; and they could not help seeing that there was included, as an asset, a sum of £500, being a balance of contract *Bonnie Princess*, which the pursuers were themselves claiming a right to retain.

Moreover, Mr. Seath at least knew perfectly well the state of A. Campbell & Son's business. He knew that the only contracts which they had, of any moment, were the unfinished contracts with his own firm. He knew that these contracts would result in a large loss; and it seems to me that he must have known that A. Campbell & Son could not, so far as could be foreseen, retrieve their position.

The Lord Ordinary does not think that, in these circumstances, the pursuers were entitled to deal with A. Campbell & Son as if they were solvent; and he thinks that they were not entitled to take from them, for their own benefit, this agreement, to the prejudice of the other creditors: 2 Bell, Com. (7th ed.) 226; *Thomas* v. *Thomas*, 5 Court Sess. Cas. 3rd Series, 198.

(1) Mor. Dict. 14,204; 1 Bell, Com. 7th Ed. 189; Hailes, 1000; 2 Ross Leading Cases, 813; Brown on Sales, p. 576; 6 App. Cas. at p. 598.

(2) From the printed memorials in this case, which are preserved in the Advocates Library (Fac. Coll. Sess. Papers, anno 1786, No. 290), the following facts appear:—

Duncanson, the shipbuilder, received payment of £208 16s., the first instalment of the price, on the 5th of November, 1784, when the keel of the

In *M'Bain* v. *Wallace* Lord Justice-Clerk Moncreiff said: "I have always considered this leading case as establishing the

vessel was laid. Some additional work had been executed, when he became bankrupt and fled the country. On the 24th of May, 1785, Simpson, his employer, presented a petition to the sheriff, craving him to appoint skilled carpenters to value the vessel as she then stood, and to authorize him to carry forward and complete the building of the vessel. The sheriff appointed valuators, who reported the value of the vessel in its then uncompleted state to be £259 16*s*. 11½*d*.; and, on considering their report, the sheriff, on the 17th of June, 1785, before answer, authorized the petitioner to carry on the work and complete the vessel. A few days afterwards certain individual creditors of the bankrupt, who were dissatisfied with the report, appeared in the petition, and on their motion a new valuation was made, in August, 1785, by which the value for unfinished work was fixed at £271 14*s*. 2*d*. Simpson then proceeded to complete and did complete the vessel in terms of the contract. Before its completion, the estates of the bankrupt were sequestrated, and a trustee appointed. On the 9th June, 1786, the sheriff after hearing parties pronounced the following interlocutor: "Finds that the property of the ship libelled remained with Duncanson, till finished and delivered to the pursuer, in terms of the contract between them; and therefore finds the pursuer is not a preferable creditor of Duncanson's for any money advanced to him previous to his bankruptcy, in part payment of the price of said vessel. But, in respect of its being for the interest of all concerned that the vessel should be completed, and that the pursuer was, by interlocutor of Court allowed to carry on the work, Finds that the pursuer is a preferable creditor on the vessel or the price thereof, for all expenses incurred by him in finishing it according to the terms of the contract; and appoints him to give in an accompt thereof against next Court."

Simpson brought that interlocutor, in so far as it was unfavourable to him, under review of the Court of Session by bill of advocation, and the case was reported to the Court, upon memorials, by Lord Monboddo. There was no counter-advocation by the trustee. The proceedings before the sheriff were conducted upon the footing that the vessel was to be completed in terms of the contract, in the interest of all parties concerned; and the object of Simpson, in advocating, was to have it found that the instalment of £208 16*s*., which he had paid before his bankruptcy, should be allowed as a deduction from the price payable by him, as well as the expenses which he had incurred in completing the vessel. The trustee, however, maintained in the Court of Session that the completed vessel belonged to him; and further contended that whilst Simpson, as mandatory for the creditors, was entitled to full payment of his outlays, he was only entitled to rank as an ordinary creditor for the instalment of £208 16*s*. It was, on the other hand, maintained by Simpson that the property of the vessel had passed to him, and that he was only liable to the trustee for any balance of price remaining after giving credit for the first instalment and his subsequent outlays.

He pleaded that he was expressly termed the "owner" of the vessel in the receipt given for the first instalment; "and that in the same manner,

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doctrine that if the price of a vessel in the building yard be payable by instalments, as the vessel proceeds, payment of the first instalment will suffice to transfer the property without further delivery, on the principle of specification, the shipbuilder holding thereafter for the true owner" (1). Lord Gifford, in *Spencer* v. *Dobie* (2), said of the same kind of case: "In this particular kind of executory contract under which ships are built, on the condition that instalments to account should be paid when the building of the ship should reach certain stages, after the instalments or some of them have been duly paid, the rights of property in the ship, whether finished or not, are different from the case of the purchase of an ordinary article." See also Lord Neaves in *Orr's Trustee* v. *Tullis* (3); Bell's Com. 7th ed. p. 187, pars. 17, 18.

It is submitted that just as in a ship the parts are appropriated as they are completed, and in an engine so far as the parts have been provided and put together, and further, even so far as the materials have not yet been fitted, if they have been sufficiently appropriated, the property passes. For they are fitted or appropriate parts of a complex whole. No doubt there is a difference between a thing such as a particular door of a peculiar shape which has been fitted and any common door that could be sold to any one, but the evidence here went to shew that the machinery was of a very special kind.

In England Bayley, J., in alluding to *Woods* v. *Russell* (4), —in which he took part—said in *Atkinson* v. *Bell*: "That as by

during the whole time that the vessel was building he, Simpson, acted as proprietor; was on board of her almost every day; superintending the work; pointed out what was to be done; complained of what was improperly executed; and in a word had all the possession of the vessel which in the nature of things it was possible for him to have."

These facts may serve to explain the view taken by the majority of the Court, who, as stated by Mr. Bell (1 Com. 5th Ed., pp. 177-8; see also 6 App. Cas. p. 599), were of opinion "that the creditors of Duncanson, taking the benefit of the contract, could not refuse credit for the payments which had been made to Duncanson himself." The statement of Mr. Bell appears to be founded on Lord Hailes' note of the opinions expressed by their Lordships at the advising of the case (Hailes' Dec. voce Sale, p. 1000).

(1) 8 Court Sess. Cas., 4th Series, at p. 368.

(2) 7 Court Sess. Cas., 4th Series, at p. 408.

(3) 8 Court Sess. Cas., 3rd Series, at p. 950.

(4) 5 B. & Al. 942.

the contract given portions of the price were to be paid according to the progress of the work; by the payment of those portions of the price the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific articles of which the ship was made." (1)

In *Wood* v. *Bell* (2) it was held that, whether the property in the unfinished ship was under the contract to vest as it was building, depended on the intention of the parties; and that the provision making the payment of the instalments depend on the progress of the ship was an *indication* of intention to vest the property as it was building. The Court also held that the property in the loose engines and materials appropriated to the ship followed the ship itself; but this part of the decision was reversed on appeal (3).

[LORD HALSBURY, L.C.:—Jervis, C.J., as reported in 25 L. J. (Q.B.) p. 324, made the test that whatever had passed the inspection passed under the contract.

LORD BLACKBURN referred to *Laidler* v. *Burlinson* (4).]

The view taken in the cases is that, primâ facie, payments of instalments pass the property. Mellish, L.J., in *Ex parte Lambton* (5), said: "I have always understood the law to be, since what was said by Lord Tenterden in the case of *Woods* v. *Russell* (6), that where a contract is made for building a ship, and the price is to be paid by instalments in proportion to the amount of the work done upon the ship, that there is an inference that the property passes." As to the agreement of the 1st of December, 1882, there was inspection; and, secondly, a stipulation that the different portions of the contract work in progress should become the actual property of Seath & Co. If the contract was not sufficient to pass the property, the law could and ought to give effect to the intention of the parties by treating it as a constructive delivery.

[They were relieved from arguing whether the deed was fraudulent until the reply.]

(1) 8 B. & C. at p. 282.
(2) 5 E. & B. 772.
(3) 6 E. & B. 355.
(4) 2 Mee. & Wel. 602; and Blackburn, Contract of Sale, 1st ed., p. 159.
(5) 10 Ch. App. at p. 414.
(6) 5 B. & Al. 942, at p. 946.

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C. Russell, Q.C., and *MacClymont*, for the respondents:—

The appellants put their case under the statute of 1856, and also independently. Independently they argue that, by the force of the contract of 1882 and actings of the parties, the jus ad rem had passed to the appellants, and there has been at least a constructive delivery. But the five contracts were of the character, partly of an executory description, and partly of the character of a locatio operarum. On the occasion of any advance the parties did not meet on the works and make an appraisement; nor was there an inspector who certified the progress, nor any direct reference of the parties that the specific stage of the work reached had become Seath's property. There may have been an allocation to particular contracts on Seath's books, but that would not pass the property. To pass the property there were two essential elements: 1st, that the payment should be for a specific stage, and 2nd, that the purchaser himself, or his agent, personally inspect and approve of that stage at the date the money is paid: *Woods* v. *Russell* (1); *Clarke* v. *Spence* (2); *Wood* v. *Bell* (3). *Simpson* v. *Duncanson* (4) could not be understood from the reports. Supposing Campbell had completed the tandem engine and boiler, the subject of the first contract, and they were inferior and not up to the mark, it would be a startling conclusion that Seath would be bound to take the defective engines on the ground that they had appropriated them (5).

In *Clarke* v. *Spence* (6) Williams, J., said: "In general, under a contract for building a vessel, or making any other thing not existing in specie at the time of the contract, no property vests in the party whom, for distinction, we will call the purchasers, during the progress of the work, nor until the vessel, or thing, is finished and delivered, or at least ready for delivery and approved by the purchaser; and that, even where the contract contains a specification of the dimensions and other particulars of the vessel or thing, and fixes the precise mode and payment by month and

(1) 5 B. & Al. 942.
(2) 4 Ad. & E. 448.
(3) 5 E. & B. 772, and 6 E. & B. 355.
(4) Mor. Dict. 14,204; Hailes Dec. 1000; Bell. Com. 7th Ed. 189; 6 App. Cas. at p. 598.
(5) See *Pearce* v. *Irons*, 7 Court Sess. Cas. 3rd Series, 571.
(6) 4 Ad. & E. at p. 466.

days. The builder or maker is not bound to deliver to the purchaser the identical vessel or thing, which is in progress, but may, if he please, dispose of that to some other person, and deliver to the purchaser another vessel or thing, provided it answers to the specification contained in the contract," and the same learned judge disagreed (1) with the general proposition stated by Lord Tenterden in *Woods* v. *Russell* (2) and repeated by Bayley, J., in *Atkinson* v. *Bell* (3). In *Laidler* v. *Burlinson* (4) a party agreed to purchase one-fourth share of a ship, and paid his share, but before the ship was finished the seller became bankrupt. It was held that the one-fourth share had not passed in the circumstances. The remarks of Mellish, L.J., in *Ex parte Lambton* (5) were mere obiter dicta founded on a general acceptance of Lord Tenterden's proposition in *Woods* v. *Russell* (2).

As to the question, whether the property in the materials, and parts prepared for executing the contracts, but which were not yet affixed to the chattel contracted for: in *Woods* v. *Russell* (2) the rudder and cordage were held to go, but in *Wood* v. *Bell*, reversing the decision of the Court below, Jervis, C.J., said "the question is, what is the contract? The contract is to purchase a ship, not for the purchase of everything in use for the making of the ship. I agree that those things which have been fitted to and formed part of the ship, would pass, even though at the moment they were not attached to the vessel. But I do not think that those things which had merely been bought for the ship and intended for it, would pass to the plaintiff. Nothing that has not gone through the ordeal of being approved as part of the ship passes, in my opinion, under the contract" (6).

In *Boak* v. *Megget*, 1844 (7), a case of the purchase of a quantity of hides which were undergoing the process of tanning, and in which the Court held that the property had not passed; the Lord Justice Clerk (Hope) said:—"The principle of the law of Scotland as to the contract of sale admits of no doubt, namely,

(1) *Clarke* v. *Spence*, 4 Ad. & E. at pp. 467, 469.
(2) 5 B. & Al. at p. 946.
(3) 8 B. & C. at p. 282.
(4) 2 Mee. & Wel. 602.
(5) 10 Ch. D. at p. 414.
(6) 6 E. & B. 355, and 25 L. J. (Q.B.) 324.
(7) 6 Court. Sess. Cas. 2nd Series, at p. 668.

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that while the obligations of the contract are constituted by consent alone, yet if delivery is to be made at a future period, the property is not transferred, but remains with the seller until delivery. This is the leading principle of our law, as it was of the civil law" (1).

In *M'Meekin* v. *Ross*, 1876 (2), there was a contract to sell the scrape iron now lying in the seller's yard, and the scrape iron to be produced during a certain time. It was held that the 1st section of the Mercantile Law Amendment Act did not apply. See also Lord Kinlock in *Wylie & Lockhead* v. *Mitchell*, 1870 (3). As to the agreement of the 1st of December, 1882, before that came into effect, it required some evidence to shew that the moveables had been specifically appropriated before the sequestration. They also submitted the Lord Ordinary (4) was correct in holding that agreement was fraudulent in a question with creditors.

Dickson, in reply:—

The agreement of 1882 was not fraudulent, there was no unfair bargain, nor undue preference over other creditors; and the cases referred to by the Lord Ordinary did not apply.

Time having been taken, judgment was delivered as follows:—

LORD BLACKBURN:—

The pursuers, Seath & Co., are shipbuilders carrying on business at Glasgow and Rutherglen, on the Clyde. The defender, Moore, is the trustee of the estate of A. Campbell & Son, who were sequestrated on the 12th of May, 1883. A. Campbell & Son, up to the date of their sequestration, carried on also at Rutherglen the business of engineers. Seath & Co. were not themselves engineers; and when, either in order to complete a ship of their own, or in order to fulfil a contract which they had entered into

(1) His Lordship further approved of Lord President Blair, a dissentient in the case of *Broughton* v. *Aitchison*, 15 Nov. 1809, F. C., who said, "The fact of the price having been paid could not have the slightest influence. That to transfer the property under the contract of sale, the consent to sell and the tradition of the commodity were both indispensable."

(2) 4 Court Sess. Cas. 4th Series, 154.

(3) 8 Court Sess. Cas. 3rd Series, 552, at p. 563.

(4) Ante, at p. 361.

with a third party, they required to have machinery made, they were in the habit of employing A. Campbell & Son to supply it.

There does not appear, at least in any of the transactions now in question, to have been any privity of contract between A. Campbell & Son and the third parties with whom Seath & Co. had contracts. When it was known to both sides that Seath & Co. wanted the machinery to implement a contract with another, that would be important in considering what agreement should be made between Seath & Co. and A. Campbell & Son: but when the agreements were made, they were between Seath & Co. and A. Campbell & Son.

In no one of the five contracts now before the House were Seath & Co. to do any work to the machinery in A. Campbell & Son's yard. Their part was to pay money, and, so far as concerned fitting the machinery into the ships, to have the ships ready at the required time. Seath & Co. advanced money in respect of the work in progress, and A. Campbell & Son did much work on machinery. On the sequestration, the trustee took possession of a large number of articles, which (if A. Campbell & Son had continued sui juris, and both parties had carried out what they contemplated doing, Seath & Co. making the further payments they were to make, and A. Campbell & Son finishing the further work they were to execute) would have been delivered on the ships, and then ceased to be in any respect the property of A. Campbell & Son. The pursuers, Seath & Co., claimed to have these articles delivered to them.

I think there is a separate question as to each article, that being what on the proof appears to have been the contract as respects that article, and also how far what was to be done to that article had been carried.

As the transactions all took place in Scotland, the effect of the contracts and the acting of the parties (when it is ascertained what they were) on the rights of Seath & Co. and A. Campbell & Son in respect of any particular article, must depend on the Scotch law.

If a firm of shipbuilders and a firm of engineers had carried on business on the Tyne instead of on the Clyde, and entered into precisely similar arrangements, and done exactly similar things,

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so that the proof was exactly the same, I think the questions what was the contract, and how far they had acted with respect to any particular article, would be identical with that in the present case. But what the effect would be on the rights of the two firms as to the property in that article, would be a question of English law.

The law of England does differ from the Civil Law and those laws founded on it, including the Scotch law, as to what is sufficient to pass the property in a moveable chattel. A contract for a valuable consideration, by which it is agreed that the property in a specific ascertained article shall pass from one to another, is effectual according to the law of England to change the property. It may be that the party who has sold the article is entitled to retain possession till the price is paid, if that was by the contract to precede delivery, but still the property is changed.

It is essential that the article should be specific and ascertained in a manner binding on both parties, for unless that be so it cannot be construed as a contract to pass the property in that article. And in general, if there are things remaining to be done by the seller to the article before it is in the state in which it is to be finally delivered to the purchaser, the contract will not be construed to be one to pass the property till those things are done.

But it is competent to parties to agree for valuable consideration that a specific article shall be sold, and become the property of the purchaser as soon as it has attained a certain stage: though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong primâ facie presumption against its being the intention of the parties that the property should then pass. I do not examine the various English authorities cited during the argument. It is, I think, a question of the construction of the contract in each case, at what stage the property shall pass; and a question of fact, in each case whether that stage has been reached.

As I understand the Civil Law, the property is not transferred without delivery, and consequently, unless there was an actual, or perhaps a constructive delivery, the property remained the property of the seller, and his creditors might seize it. But

though this was so, yet when things had gone so far as that, according to the true construction of the contract in each case, there was perfecta emptio, there was a jus ad rem transferred to the purchaser, though as between the purchaser and the creditors of the vendor a complete property remained in the vendor; there was a property, though not a complete one transferred to the purchaser, such that the risk of loss and the chance of gain were both transferred to the purchaser, so that the property remaining in the vendor was as between him and the purchaser not a complete property.

The Scotch law, as I understand it, followed the Civil Law; though there was a perfect sale transferring the risk of loss, and the chance of gain, and giving the purchaser an interest in the thing, so as to enable him, as against the vendor, to enforce delivery, yet, unless there was a delivery actual or perhaps conventional, the creditors of the vendor might seize the thing. An alteration was made in the law in this respect by the Mercantile Amendment Act, 1856: "Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for creditors by any process made by sequestration to attach such goods as the property of the seller," "to the effect of preventing the purchaser, or other in his right, from enforcing the delivery of the same."

I do not think this enactment has the effect of saying that the property shall pass; but when a sale has proceeded so far that the purchaser has a right to enforce the delivery, it renders the distinction between the right of the purchaser, and that of one to whom, under the law of England, the property had passed, merely a nominal distinction not affecting the substantial rights.

The Lord Ordinary in this case, having heard all the proof, has come to the conclusion that the pursuers have failed as to all the articles; he therefore, assoilzied the defender. As to some, by a minute agreed to by the parties, they have been given up; and so far there has been an alteration made in his interlocutor. There is no appeal as to that alteration, and we need not inquire what were the motives which led the parties to agree to that minute. Subject to that alteration the interlocutor of the Lord

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Ordinary is adhered to. And it is against that interlocutor that this appeal is brought.

I have come to the conclusion that the interlocutor is right, and that the appeal should be dismissed with costs.

I agree with the Lord Ordinary that no custom of trade is proved which could affect the construction of the five contracts.

The first of the contracts, that of the 2nd of September, was to furnish and to fit up, in a vessel to be built by the pursuers, an engine and boilers, for a lump sum of £1800; and I am not sure how far the Lord Ordinary, when he says that "the contract was not a contract of sale habile to convey a jus ad rem," means to express an opinion that, because the contract was to complete and deliver the engine and boilers on board the vessel of the pursuers, and then to fit them up there, which fitting up, I think, would be aptly described as work and labour; the furnishing of the boilers and engine could not under any circumstances be a sale of them. I should pause before I agreed to that; but I think it quite sufficient to say that primâ facie there was no sale, at least till the boilers and engine were so far completed as to be fit for delivery on the vessel, where they were to be fitted up by A. Campbell & Son, and that there is nothing in the contract to indicate any intention that they should be held as sold at any earlier stage; whilst the fact that there was to be one lump price for the whole engine, boilers, and fitting up, is strongly against that construction.

The second contract, that relating to the *Brighton*, does contain a stipulation that "the first parties shall pay to the second parties the sum of £6300, for the said engines, boilers, machinery, and appurtenances, and that by four equal instalments as follows, viz., the first when cylinders, sole plates, and condensers are cast; the second when the machinery tooled, and boilers ready for riveting; the third when the engines, boilers, and machinery are all ready alongside for lifting on board; and the fourth when all completed and tried to the satisfaction of the owners and ready for delivery.

I do not think it necessary to inquire whether, if the question had arisen as to the rights of the pursuers after the first three instalments had been earned and paid, this would or would not

have been sufficient to establish that the engines and boilers so far completed were then sold; for, as I understand the case, the boilers and engines were, before the sequestration, as far as completed, completely delivered, and all that the defender seized were some loose articles in the yard of the sequestrated trader, which probably were intended to be part of the boilers and engines, but never had become so.

The third contract does stipulate for a payment of one-third of the price "when the boiler is on board;" but it never reached the state when it could be put on board.

The fourth contract contains no stipulation as to an instalment at all. I agree with the Lord Ordinary that, if the reasoning as to the first contract is right, it applies also to these contracts.

The fifth and last contract, that relating to the *Bonnie Princess*, was rather peculiar. The Liverpool and Welsh Coast Company had agreed to pay Seath & Co. £1500, after "receiving a report by two competent engineers stating that the machinery is working perfectly satisfactorily." The agreement between Seath & Co. and A. Campbell & Sons, was:—"First, that the second party," A. Campbell & Son, "shall execute the work and undertake and implement the whole obligations undertaken by and imposed upon the first party," T. B. Seath & Co., "by the said agreement in all respects, excepting only the requisite alterations to the bunkers and others coming within the shipbuilders' department (which the first party shall execute at their own expense), and the first party shall be entitled to enforce implement of the said agreement against the said second party. Second. That the second party shall receive payment of the whole sum stipulated to be paid by the company under said agreement on the conditions therein stated, but the first party shall have a lien thereon for any sum which may be due by the second party to them. Third. That the second party shall free and relieve the first party of all claims which may arise or be made against them by the said company, in respect of alleged breach of the said agreement, as well as of the original contract, so far as the same has been, or may be occasioned by their default."

The articles in question never were put on board the steamer,

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and still less were the conditions on which alone the Liverpool and Llandudno Company were to pay the £1500 fulfilled. It seems impossible to construe this contract as amounting to a sale of any of the articles under this contract.

I am much inclined to think that where a contract made in Scotland was such, and had been so far executed that if a precisely similar contract made and so far executed between two firms on the Tyne would have been construed to amount to a sale passing the property, that contract, in Scotland, ought to be construed as giving a jus ad rem against that article. Perhaps that may not be always so. But I am of opinion that if the whole of these transactions had been English there would not in respect of any one of the articles have been established a contract such as, under the circumstances, to pass the property.

As for the agreement of the 1st of December, 1882, I think it is not an agreement for a sale at all, but an attempt to bargain for a pledge or security. A pledge or security without delivery of possession is, I think, not good. And though in England a bill of sale under seal, having that effect, may be made, this is not a bill of sale.

LORD WATSON:—

The respondent, Alexander Moore, is trustee for the creditors of A. Campbell, jun., who carried on business as a manufacturing engineer in Glasgow, under the firm name of A. Campbell & Son, until his estates were sequestrated on the 12th of May, 1883. For many years prior to his sequestration the bankrupt was largely employed by the appellants, who are shipbuilders at Glasgow and Rutherglen, to make and fit up engines and machinery in vessels constructed by them either under contract or on speculation, and that employment constituted the main part of the bankrupt's trade, his other business consisting chiefly of job work and repairs.

At the date of his sequestration the bankrupt was in the course of executing five different contracts with the appellants; the first of these, dated September, 1881, for furnishing tandem machinery to the *Elms*; the second, dated March, 1882, for supplying and fitting engines for the *Brighton*; the third, dated

August, 1882, for constructing and fitting a new boiler on board the *Satanella*; the fourth, dated September, 1882, for making and fitting two tandem engines on board a barge belonging to the Trinity Board; and the fifth for removing her boilers from the steamer *Bonnie Princess*, and replacing them with two upright boilers, and making certain alterations in the details of her machinery and engines. Of these five vessels, one only, the *Elms*, was built by the appellants on their own account, whilst the *Brighton*, the *Satanella*, and the Trinity barge were built for customers. The *Bonnie Princess* had been delivered to the purchaser with her hull and engines completed, but she did not attain the guaranteed speed, and was returned to the appellants in order that her machinery, which had been supplied by the bankrupt, should be altered and repaired. The bankrupt, on the 1st of December, 1882, undertook to make these alterations and repairs "to the satisfaction of an engineer to be appointed by the shipowners."

In the contract for the *Brighton's* engines it was expressly stipulated that the price (£6300) was to be payable to the bankrupt by four equal instalments at specified stages; but none of the other four contracts contained a written stipulation to the effect that any part of the price was to be paid before his contract obligations had been fully performed by the bankrupt.

It is a fact established by the evidence that the appellants throughout the whole course of their dealings with the bankrupt were in use to make advances to him from time to time, to account of the contract price, even in cases where there was no stipulation as to instalments. These advances were not made in virtue of any legal obligation, and their amount was determined by the appellants, with reference to their general knowledge of the progress which the bankrupt had made towards completion of the contract work or in the preparation of materials for it, and without inspection or express acceptance of any part of the work as conform to contract.

In the month of November, 1882, the bankrupt became seriously embarrassed for want of ready money. The contracts which he had then on hand related to the first four of the vessels already mentioned; and he was aware, and informed the appel-

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lants, that he would be obliged to stop his works and suspend payments unless he received pecuniary assistance from them. The appellants agreed verbally to make him advances from time to time to account of the contract prices (the amount of such advances being left to their discretion), in respect of his granting to them a letter of agreement or obligation, which bears date the 1st day of December, 1882. The only consideration expressed in that writing is that he had entered into contracts with the appellants, "in some cases without certain stipulations being expressed with reference thereto." The first article of the writing provides that the appellants shall at all times have free access to the bankrupt's premises for the purpose of inspection, and that the "whole work and material of any such contract shall be subject to the approval of the said T. B. Seath and Company, or of their representative." The second article is to the effect that on a payment being made on account of any contract, "the portions of the subject thereof, so far as constructed, and all materials laid down for the purpose of constructing the same, shall become and be held as being the absolute property of the said T. B. Seath and Company," subject only to the bankrupt's lien for so much of the price as might be unpaid. By the fifth article the appellants are empowered, upon the insolvency of the bankrupt, or his failure to proceed with due diligence in the execution of the work, not only to take possession of the completed work, and "all materials laid down or obtained for the construction thereof," but to enter, if they shall think proper, into possession of his premises, and use his plant, tools, and machinery for the completion of the work. By the fourth article the bankrupt undertakes the risk of all contract work until completed and delivered and also undertakes to effect adequate insurances against loss by fire in the name of the appellants. These conditions are declared to be applicable to all contracts or agreements then current, or which might thereafter be made between the parties. The only contract subsequently made was that relating to alterations and repairs in the machinery of the *Bonnie Princess*.

At the date of the sequestration, none of the five contracts in question had been completed, and no machinery had been placed on board ship, except in the case of the *Brighton*. The fitting

of her engines was nearly completed; but certain parts of the machinery, some of them unfinished, had not been put on board or fitted. The trustee took possession for behoof of the general body of creditors, of the uncompleted work and materials which he found on the bankrupt's premises, which had either been used or were intended to be used in the execution of these contracts. The appellants, on the 30th of June, 1883, instituted the action in which this appeal is taken, concluding for delivery to them of the whole of such work and materials. The articles claimed, which I shall afterwards have to refer to more particularly, are enumerated in the conclusions of the summons, and also in certain inventories forming No. 24 of process, and they are generally described in the summons as being "connected with the fulfilment" of one or other of the five contracts already referred to.

The Lord Ordinary (Adam) rejected the appellants' claim, and by interlocutor, dated the 8th of April, 1884, assoilzied the respondent, with expenses. The appellants reclaimed to the First Division of the Court; but before judgment the parties lodged a joint minute, setting forth that the respondent, Moore, consented to its being found, and declared that, as in a question with him or the bankrupt, the appellants were entitled to possession of the last three items of the first inventory, and also of the articles forming branch 2 of the third and branch 2 of the fifth inventory. By interlocutor, dated the 9th of December, 1884, their Lordships found and declared in terms of the minute, and to that extent altered the judgment of the Lord Ordinary; but quoad ultra refused the reclaiming note, adhered to the interlocutor reclaimed against, and found the respondent entitled to additional expenses.

The appellants maintain that, by the law of Scotland, the work executed under each contract, so far as then completed, vested in them, and became their property whenever they made payment of an instalment, or an advance to account of the price such as they considered fairly proportionate to its value. That proposition was founded upon the case of *Simpson* v. *Creditors of Duncanson* (1). The decision in that case does not, in any view of it, go

(1) 2 Aug. 1786, Mor. Dict. 14,204.

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so far as to support the claim preferred by the appellants to the property of articles, finished or unfinished, merely intended for use in the construction of a vessel, but not yet made part of the thing sold. Nor in my opinion can it be held as authority for the general proposition that, in the circumstances narrated in the report, the property of that part of an unfinished ship which has actually been constructed passes to the purchaser without delivery. The report of the case, as collected by Morrison, and supplemented by Professor Bell (1), is exceedingly meagre; and there may have been circumstances before the Court sufficient to warrant the inference that delivery had been made, which have not been noticed by the reporter (2).

At the time when *Simpson* v. *Creditors of Duncanson* (3) was decided, and for many years afterwards, the purchaser of a vessel or of any other corporeal moveable had, before delivery was made to him, and its property vested in him, no right to the thing sold as against creditors of the seller who had used diligence, or against the trustee in his sequestration. Until possession was given to the purchaser, the trustee had the option either of enforcing the contract against him, or of taking the thing sold, leaving the purchaser to rank for a dividend upon the amount of loss he sustained by non-fulfilment of the contract. By the law of England the appropriation of a specific chattel by the vendor, and the agreement of the vendee to take that specific chattel and pay the stipulated price, have the effect of vesting the property of the chattel in the vendee. In Scotland the effect of such an appropriation and acceptance by the contracting parties is to perfect the contract of sale, and to give the purchaser a personal right to demand delivery of the specific chattel from the seller. When the contract is thus perfected the risk is transferred to the purchaser, according to the maxim of the civil law, periculum rei venditæ nondum traditæ est emptoris; but the property of the chattel does not pass to him until he has obtained delivery under the contract.

In the year 1856, the Mercantile Law Amendment (Scotland) Act was passed, for the purpose of remedying the inconvenience

(1) Com. 5th Ed. vol. i. pp. 177, 178. (2) See note, *ante*, p. 362.
(3) 2 Aug. 1786, Mor. Dict. 14,204.

arising from certain differences between the laws of England and the sister country. Sect. 1 of that Act provides that "where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser, or others in his right, from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser."

These enactments involve no alteration of the principles previously applicable to the contract of sale itself. Their sole effect is to deprive the creditors of the seller or the trustee in his bankruptcy of the right, which they previously had, to defeat the purchaser's right to demand delivery of the goods sold to him. In construing the first section of the Act, it has all along been held, and, in my opinion, rightly held, in the Courts of Scotland, that it imposes no limitation upon the right of the seller's creditors or trustee until the contract of sale has been perfected in the sense which I have already indicated; in other words, that goods are not "sold" within the meaning of the section unless the contract has been so far completed as to confer a proper jus ad rem upon the purchaser.

The appellants maintain that, under these provisions of the Mercantile Law Amendment Act, they are entitled to demand delivery from the trustee of all the articles enumerated in their summons. In order to establish that right with regard to all or any of the articles in dispute, it must be shewn that these had, before the sequestration, been "sold" to them by the bankrupt within the meaning of the Act. The authorities which appear to me to have the most material bearing upon this part of the case are *Woods* v. *Russell* (1), *Clarke* v. *Spence* (2), and *Wood* v. *Bell* (3). It is true that these are English decisions relating to ships in course of construction, and that, in the present case, none of the

(1) 5 B. & Al. 942. (2) 4 Ad. & E. 448.
(3) 5 E. & B. 772; 6 E. & B. 355.

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machinery or articles in dispute had been attached to the vessels of which they were severally intended to form part. But I see no reason why the principles applicable to the sale of part of a ship should not equally apply to the sale of part of a marine engine, or other corpus manufactum in course of construction. And so far as I understand the laws of the two countries, the same circumstances and considerations which, in England, sustain the inference that a chattel has been "sold" to the effect of passing its property to the vendee, will, in Scotland, generally be sufficient to sustain the inference that it has been "sold" to the effect of transferring the risk to the purchaser, and giving him a jus ad rem, enforceable against creditors of the seller under the Act of 1856.

The English decisions to which I have referred appear to me to establish the principle that, where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship, that at a particular stage of its construction, the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, accessione, become his property. It also appears to me to be the result of these decisions that such an intention or agreement ought (in the absence of any circumstances pointing to a different conclusion) to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular stage, coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser, or some one on his behalf. I do not think it is indispensable, in order to sustain that inference, that there shall be a stipulation for payment of an instalment in the original contract, or that the stipulated instalment shall have been actually paid. The absence of these considerations, which are, in themselves, of great importance, might, in my opinion, be supplied by other circumstances. At all events, whenever during the currency of a contract which contains no such stipulation, the parties in good faith agree that the purchaser shall pay a sum to account of the price,

and that the vessel, so far as constructed at the date of that payment, shall be appropriated to the contract, I see no reason to doubt that the new covenant so made ought to have the same effect as if it had been a term of the original contract. I am, however, of opinion that, by the law of England, in order to pass the property as sold, there must always be facts proved or admitted sufficient to warrant the inference that the purchaser has agreed to accept the corpus so far as completed as in part implement of the contract of sale.

There is another principle which appears to me to be deducible from these authorities and to be in itself sound, and that is, that materials provided by the builder and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract, or as "sold," unless they have been affixed to or in a reasonable sense made part of the corpus. That appears to me to have been matter of direct decision by the Court of Exchequer Chamber in *Wood* v. *Bell* (1). In *Woods* v. *Russell* (2) the property of a rudder and some cordage which the builder had bought for the ship was held to have passed in property to the purchaser as an accessory of the vessel; but that decision was questioned by Lord Chief Justice Jervis, delivering the judgment of the Court in *Wood* v. *Bell* (1), who stated the real question to be "what is the ship, not what is meant for the ship," and that only the things can pass with the ship "which have been fitted to the ship and have once formed part of her, although afterwards removed for convenience." I assent to that rule, which appears to me to be in accordance with the decision of the Court of Exchequer in *Tripp* v. *Armitage* (3).

I shall now advert to the character of the articles claimed by the appellants, as these are enumerated in the summons, and more fully described in the Inventories, No. 24 of Process, which I have carefully examined. The result of that examination has been to satisfy me that, with the exception of one item (a tandem engine, said to be almost complete) in the inventory relating to the *Elms*, two items in that relating to the *Satanella*, three items

(1) 6 E. & B. 355. (2) 5 B. & Al. 942.
(3) 4 M. & W. 687.

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in that relating to the *Trinity*, and of two items in that relating to the *Bonnie Princess*, all the articles claimed, though meant to be used in the execution of the five contracts current at the date of the sequestration, are mere disjecta membra, more or less finished, which have never been attached to or become part of any specific corpus. It appears to me to be impossible to hold that any of these articles were specially appropriated to the several contracts for which they were provided, or, in other words, that they were "sold" in such sense as to give the appellants a jus ad rem, unless your Lordships shall be of opinion that the decisions of the Court of Exchequer in *Tripp* v. *Armitage* (1), and of the Exchequer Chamber in *Wood* v. *Bell* (2) are contrary to law. With regard to the excepted items, the descriptions given of them are not so minute as to enable me to determine whether all that is comprehended in each item, and in some instances whether any part of the item can be reasonably considered as a corpus, in the same sense as the framework or hull of a ship in course of construction.

Before dealing with the question whether, assuming them to be of a character which admitted of their being appropriated to the purchasers, these excepted items were actually "sold" to the appellants, to the effect of giving them a jus ad rem, I think it will be convenient to consider the legal effect of the letter of agreement by the bankrupt, dated the 1st of December, 1882. Although the letter professes to embody certain stipulations which had been omitted in framing his contracts with the appellants, the leading conditions to which the bankrupt thereby submits are, in my opinion, entirely collateral to the contract of sale. The plainly expressed purpose of the letter was to vest the appellants with the absolute property, not only of the subject of each contract so far as actually constructed, but of all materials brought to the bankrupt's premises in order to be used in its construction, probably with the view of giving the appellants security for advances made by them to account of price.

I need hardly say that, by the law of Scotland, the property of corporeal moveables cannot be passed without delivery of possession; and a stipulation in a contract of sale that the thing sold

(1) 4 M. & W. 687. (2) 6 E. & B. 355.

shall become the property of the purchaser without delivery is as invalid against creditors of the seller, as it would be in any other contract. In *Anderson* v. *M'Call* (1) Lord Neaves said, "The law of Scotland is clear that no property in moveables can be passed without delivery, and that no security can be constituted over moveables retentâ possessione. A written instrument of possession will not pass the property of moveables. . . . The fundamental principle is, that the right of property in moveables does not pass by a consensual contract." The appellants' counsel hardly disputed that such is the law of Scotland, and that there was no delivery to the appellants of any of the articles claimed by them; but they argued that the letter indicated the intention of the parties that, upon an advance being made, on account of any contract, the articles constructed and provided for its execution should be "sold" under the contract. I am unable to infer that intention from the tenor of the writing. On the contrary, its terms appear to me clearly to indicate that their intention was to give the appellants a right of property in all materials collected, and all parts of machinery finished or unfinished with a view to the contract, as well as the machinery so far as set up and connected, and that quite irrespective of any obligation on the part of the bankrupt to use such materials in the execution of the contract, or of any obligation on the part of the appellants to accept the property, to be thus vested in them, or any portion of it, as in implement of the contract.

It was urged for the respondent at your Lordships' bar, as well as in the Courts below, that, in the circumstances disclosed in evidence, the letter of the 1st of December, 1882, was void in law, in respect that it conferred upon the appellants an undue preference over the general creditors of the bankrupt. Had the law of Scotland permitted the document to receive effect according to its terms, it might have been necessary to decide that point; but if the views which I have expressed in regard to its import and legal effect meet with your Lordships' approval, it becomes unnecessary to dispose of it.

It only remains for consideration whether the excepted items already referred to connected with the *Elms*, *Satanella*, Trinity barge, and *Bonnie Princess* contracts, were sold to the appellants

(1) 4 Court Sess. Cas. 3rd Series, at p. 771.

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within the meaning of sect. 1 of the Scotch Mercantile Law Amendment Act. I assume that each of these items was in reality a specific corpus, capable of being appropriated to the contract in part implement of which it had been constructed, at the time when an instalment, or advance to account of the contract price was actually paid. In the case of each of these contracts, one or more of such payments had been made before the date of the sequestration; and although they were not originally stipulated, I should nevertheless be of opinion that the appellants had acquired a personal right to insist for delivery, if it appeared that either at the time when such payments were made in respect of a particular contract, or at the time when they were appropriated by mutual consent to that contract, the parties intended and agreed that the contract work, so far as then completed and existing in formâ specificâ, should be sold" to the purchaser. But in order to constitute an agreement to that effect, it must appear that the purchaser consented to accept of the subject in the same condition in which it then was as part of the completed subject which was to be subsequently delivered to him by the seller under the contract of sale.

I have come to the conclusion that the appellants' claim to the excepted items must fail; because I cannot find in the case of any one of them, the least trace of an agreement or of an intention on their part to accept of it as in implement of the contract of sale. Had they inspected the work and material, as the purchasers had done in *Clarke* v. *Spence* (1) and *Wood* v. *Bell* (2), there would have been room for the inference that they had accepted as in terms of the contract the work, so far as completed and accepted, and that the bankrupt had no longer the right to alter or reconstruct any part of it, thereby necessitating a second inspection. Mr. Seath, one of the partners of the appellant company, was from time to time in the bankrupt's premises, and had a general knowledge of the progress made in the work of each contract and in preparing materials for its execution; but it is not pretended that there was inspection either by him or any other person representing the appellants. There is, in fact, not a single circumstance either admitted or established in evidence sufficient to support the inference that they meant to accept, or

(1) 4 Ad. & E. 448. (2) 5 E. & B. 772; 6 E. & B. 355.

did accept, the work executed as in implement, pro tanto, of the contract, whilst there are many circumstances which lead to an opposite conclusion.

I am accordingly of opinion that the interlocutors appealed from ought to be affirmed, and the appeal dismissed with costs.

LORD BRAMWELL:—

I agree in the conclusions of my noble and learned friends, and in the reasons which have led them to those conclusions. All I wish to say is that our opinions do not in any way impugn the principle of *Woods* v. *Russell* (1), except as to the two chattels there mentioned, the rudder, and some rope; and I may repeat what Lord Justice Mellish said, that I should be very sorry if anything we said did so, or seemed to do so. Nor do our opinions in any way impugn the reasons given in that case for that decision. I also agree that the same reasoning would apply to any other chattel as to which the parties should agree that the property should pass while the chattel was in an incomplete state.

LORD FITZGERALD:—

I have read and carefully considered the judgments which have been delivered by my noble and learned friends opposite, and I entirely concur in them. Those judgments render it unnecessary for me to express any opinion upon the question at all.

LORD HALSBURY:—

I have also had an opportunity of reading the judgments of the two noble and learned lords, and I desire to express my concurrence.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 8th March, 1886.

Agents for appellants: *Holmes, Greig & Greig, for J. Young Guthrie, S.S.C., Edinburgh.*

Agents for respondent: *Morten, Cutler, & Co.*

(1) 5 B. & Al. 942.

[HOUSE OF LORDS.]

H. L. (Sc.) 1886 June 22.

GLASGOW AND SOUTH WESTERN RAILWAY COMPANY . . . . . } Appellants;

AND

MACKINNON AND ANOTHER . . . . Respondents.

Railway—Unequal Rates—Agreement to reduce—"Lower Rates"—Meaning of.

A railway company agreed with A. & B., coalowners, that they would carry their coal, subject to clause 11, at certain charges given in the schedule; and they also agreed (clause 9) that in the event of their charging any other trader for the same description of traffic lower rates than those stipulated to any station, then in that event A. & B. were to have a corresponding reduction in the rates payable by them to such station. Clause 11 was to the effect that notwithstanding the rates or charges before specified, they were entitled to charge A. & B. rates or charges similar to those charged and paid by the Eglinton Coal Company; and in the event of any consideration being given to the Eglinton Company for raising them, a similar consideration shall be given to A. & B. The railway company charged D. another coalowner, not a party to the agreement, a lower rate per ton, taking into account the greater distance the coal was carried. The agreement with the Eglinton Company was not in evidence. It was alleged the rate charged A. & B. was not higher than that charged to the Eglinton Company:—

Held, affirming the decision of the Court below, that there was nothing in clause 11 to supersede the effect of clause 9, and that upon the true construction of the latter clause, A. & B. were entitled to a corresponding reduction with D., and repayment of over-charges; "lower rates" meaning proportionately lower rates per ton per mile, and not a less sum per ton irrespective of the distance carried.

APPEAL against an interlocutor of the Second Division of the Court of Session, Scotland.

The appellants, the Glasgow and South-Western Railway Company, as the first party, made an agreement in 1875 with a large number of coalowners in Ayr, as the second party, including one of the respondents. The material clauses of this agreement were as follows:—

Second. The second party respectively shall, subject to article 11 hereof, as from the said date pay to the first party, for and in respect of the traffic of the second party before mentioned, the charges following, viz.:—For and in respect of common and fire-clay bricks and tiles passing along the said railways the second party shall pay to the first party the charges specified in Schedule A. hereto annexed, and signed as relative hereto; and for and in respect of coal

and dross passing along the said railways, the second party shall pay to the first party the charges specified in Schedule B. hereto annexed.

Ninth. It is hereby provided and agreed that in the event of the first party charging to any other trader, for a distance above six miles, for the said description of traffic to any station or place, lower rates than those stipulated in this agreement to be paid by the second party, then, and in that event, the first party shall give to the second party a corresponding reduction in the rates payable by them for their traffic of a similar description to such station or place, while and so long as such lower rates are charged against such other trader.

Ten. The present agreement shall subsist and endure until February 1, 1890.

Eleven. It is specially agreed that, notwithstanding the rates or charges before specified, the first party shall be entitled to charge and the second party shall be bound to pay rates or charges similar to those which may for the time being be charged to and paid by the Eglinton Iron Company in respect of the carriage of common and fire-clay bricks and tiles and coal and dross for land sale and shipment, not exceeding the scale of rates and charges paid by the second party immediately preceding the 1st day of January, 1874, and in the event of any consideration being given to the Eglinton Company a similar consideration shall be given to the second party to this agreement.

Schedule B., which referred to cost and distances, was as follows:—

When carried six miles or under, the sum of 7½*d.* per ton; when carried any distance above six miles, and not exceeding sixteen miles, the sum of 1¼*d.* per ton per mile; when carried any distance above sixteen miles, and not exceeding twenty-six miles, the preceding rate for the first sixteen miles; and for every mile thereafter the sum of ¾*d.* per ton per mile. When carried any distance exceeding twenty-six miles, the preceding rate for the first twenty-six miles, and for every mile thereafter the sum of ½*d.* per ton per mile.

William Mackinnon, one of the respondents, as trustee on the sequestration of Allan Gilmour, one of the above-mentioned coalowners, raised this action, concluding, inter alia, for a finding that the appellants had been from a specific date charging to other traders, for a distance above six miles, for the carriage of coals to Troon Harbour, lower rates to the extent of 6*d.* per ton than those stipulated in the agreement; and further, to find and declare that the defenders were bound to give to the respondents from the same date a reduction of 6*d.* per ton in the rate payable by him for the conveyance of coals from Portland Colliery to Troon Harbour, so long as such lower rates are charged against the other traders. He also concluded for payment of £198 8*s.* 2*d.* as overcharge. They stated, and it was not denied, that while they were charged 1*s.* 3*d.* per ton for carriage

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GLASGOW AND SOUTH WESTERN RAILWAY CO. v. MACKINNON.

of their coal from Portland Colliery to Troon, a distance of twelve miles, being the proper charge at the rate stipulated in Schedule B. of the agreement, viz. 1¼*d.* per mile, the appellants were carrying coals for the proprietors of the Lanemark Colliery, who were not parties to the agreement, from their colliery to Troon and Ayr, distances of thirty-one miles and twenty-four miles respectively, for 1*s.* 7*d.* and 1*s.* 9*d.* per ton. The proper sum exigible for the Lanemark coal, if it had been charged at the same rate per ton per mile as the Portland coal, would have been 2*s.* 6*d.* per ton to Troon and 2*s.* 2*d.* to Ayr. The appellants denied that in any case had they charged for the same description of traffic to any station lower rates than those stipulated in the agreement to be paid by the second party. They also founded on the terms of clause 11 of the agreement; and under reference thereto, stated that the rates charged by the appellants for the carriage of the respondents' coal do not exceed the rates charged and paid by the Eglinton Iron Company for the carriage of their coal to the same place for the same distance, and do not exceed the scale of rates and charges paid by the second party immediately preceding the 1st of July, 1874.

On the 11th of March, 1885, the Sheriff Substitute found that the respondents were entitled to a reduction; and in a second interlocutor, dated the 15th of April, 1885, he found that the pursuer was entitled to select any individual trader, not being a party to the said agreement, to whom lower rates than those therein specified are charged and to insist on being placed on an equal footing with him; and he also found that the amount due to the respondents was £148 16*s.* 1½*d.*

The appellants lodged a reclaiming note. On the 15th July, 1885, the Second Division of the Court of Session adhered (1).

(1) 12 Court Sess. Cas. 4th Series, 1309; 22 Scot. Law Rep. 875.

THE LORD JUSTICE CLERK said:—"The defenders contended that the real object of clause 9 was to equalize the cost to the traders, so that he who paid for six miles, or ten miles, or twelve miles, should pay as much, but no more, than he who had his coal carried for twenty or thirty miles. That would not be expressed by the term 'rates.' Rates imply payment on a principle, and the principle here adopted is so much per ton per mile. This is the standard, and according to that standard obedience to or infringment of this agreement is to be judged."

On appeal,—

June 22. *The Lord Advocate* (*Balfour*, Q.C.), and *R. S. Wright* (with them Sir *R. Webster*, Q.C.), contended for the appellants that clause 9 meant a less sum per ton without regard to distance. On the second point, they maintained that clause 11 overrode all the previous clauses, and they desired that the case should be sent back to the Court below, so that they might produce a proof of the agreement with the Eglinton Company and adduce evidence as to what rate they were charging that company.

Moulton, Q.C., and *A. D. Maclaren*, were heard on the second point only. The appellants if they had so desired could have inserted the agreement in their record, it was not a question of proof. If clause 11 was to override all the previous clauses up to clause 2, then it would be construing "any other trader" in art. 9 as meaning the Eglinton Company and that company alone; but to give such a wide reading to clause 11 is inconsistent with fair construction.

The Lord Advocate, in reply.

LORD BLACKBURN:—

The question turns upon the construction of an agreement which is set out, and of which I think only the 2nd, 9th, and 11th articles are in any way important. [His Lordship read the second article.] It refers to the charges which are in the schedule, which I need not at present read. I need only state that there are such charges, and that those charges are made to depend upon the distance for which the coals have been carried along the railway. [His Lordship then read the 9th article.]

It is admitted that the railway company do charge to Troon (taking one place for instance) from Lanemark a rate which is considerably lower than the rate in the schedule, and that they do continue to charge against the pursuers the scheduled rate, which is higher consequently then that which they actually do charge to the Lanemark Colliery Company. An attempt has been made, unsuccessfully, both before the Sheriff Substitute, and before the Court below (and I think rightly unsuccessfully), to argue that

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the 9th article has the effect of saying that so long as they do not charge to any one else a lower sum to Troon than the sum which they charge to the pursuers to Troon, it does not matter how much further they may carry gratis, throwing the extra distance into the bargain. I do not think that that can be the true construction of the agreement. It does not seem to be the meaning of the words, and certainly, according to my view of it, it is not what the parties would be likely to intend. That being the unanimous opinion of the Sheriff Substitute and of all the judges in the Court of Session, I do not think it necessary to dwell further upon that point.

But there then comes a matter which it is somewhat difficult to understand. After that 9th article there comes the 10th: "The present agreement shall subsist and endure until the 1st day of February in the year 1890." Then comes the 11th article, which quite evidently relates to a new subject which begins there. The 2nd article had provided that "the second party respectively shall, subject to art. 11 hereof, as from the said date, pay to the first party" the rates in the schedule. Then this 11th article comes in and says:—[His Lordship read it.] The contention has been that the effect of that article is to say that so long as the Eglinton Company are charged as much as or more than the pursuers, the pursuers have no right to complain and no right to redress, though the 9th clause is broken,—that they cannot recover on that ground. It is difficult to understand this 11th stipulation without having seen the whole of the agreement with the Eglinton Company, and knowing the facts about it, so as to see what that agreement actually was. The only thing that it is material to consider at present is, does the mere fact (which is all that is averred, and I think it is not at all disputed) that the Eglinton Company do actually pay a higher sum, deprive the pursuers of the right to recover the £148 which, according to the construction I have already put upon the previous article of the agreement, has been wrongfully extorted (if I may use the phrase) from them in consequence of the railway company having carried more cheaply the coals from the Lanemark colliery? I cannot see it. It is very difficult indeed to construe this agreement without having the whole of the Eglinton agreement before

us, and seeing what the Eglinton Company were doing; but this much I may say: it is what the Lord Justice Clerk says—indeed it is the whole of what he says upon this point: "They say if the Eglinton Company are charged no more than the charge now made against the complainers, they are not within the 9th clause at all. But I am not prepared to give effect to that contention, and on the whole matter I think the company is here in the wrong." I thoroughly agree in that—I have felt rather a desire myself to say a little more than merely to say that "I am not prepared to give effect to that contention," but upon looking at it I find that it all comes round to that. The burden is very strong indeed upon the company to shew that art. 11 does bear such a construction as to nullify art. 9 which goes before it. They have not given any grounds for that, and consequently I do not think I can go much further than to repeat again what the Lord Justice Clerk has said, namely, that I am not prepared to give effect to that contention.

That being so, I think that the interlocutor appealed against is right, and that the appeal now lodged ought to be dismissed with costs, and I move accordingly.

LORD FITZGERALD:—

I entirely concur. I only desire to say, as to art. 11, that I have found great difficulty in understanding the argument as to its effect and operation, and I am not at all sure that I have a very clear conception of it at present; but I certainly do decline to offer an opinion upon an agreement which is not before us, and which if it was to be relied upon in the manner in which it has been relied upon to-day by the Lord Advocate, ought to have been put forward prominently by the defenders and ought to have been before your Lordships now.

There is one point I may advert to. As I understand the case as it stands it is this. The condition of things at the time this agreement of 1875 was entered into was that the coalmasters were then paying rates under the agreement of 1874. The Eglinton Company were then paying rates in a lesser degree under their own special agreement, which is not before us. The object and intention of the parties seem to have been to equalize

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these two things. The result was, as I understand by the answer to an inquiry which I made in the course of the argument, that the schedule of rates under this agreement of 1875, and the rates payable by the Eglinton Company represented the same thing—they were equal in degree, and there has been no change of circumstances since. The Eglinton rates have not been altered. There is indeed a statement that they had been diminished in reference to one particular colliery, but that being objected to they were immediately increased again, and potentially the state of facts is the same now as it was when this agreement was entered into in 1875.

Every agreement is construed, not according to circumstances which may arise but, according to the circumstances existing at the time the agreement was entered into. We have not the Eglinton agreement before us, and I am at a loss to see what effect it can have upon art. 9 of this agreement. Article 9 speaks of the "rates stipulated in this agreement"—these are the rates, and if there had been any change of rates under article 11 that change of rates would still represent rates stipulated for in this agreement, and would leave, as to these rates, article 9 in full force. The truth is that there has been no change. I do not know that the case comes before us in the light in which we ought to express any opinion upon it so far as regards the Eglinton agreement. Upon the statement which is before us therefore I quite agree with my noble and learned friend that as to this art. 11 the less we say the better; but I cannot refrain from making this observation, that the whole language of art. 11 points to an increase of rates and not to a diminution; it points to an authority to charge on the one side and a liability to pay on the other. You will find that the only additional stipulation is that in the event of the railway company having bribed the Eglinton company to submit to an increase of rates, it shall give exactly the same bribe to the coalmasters as it has given to the Eglinton company.

LORD HALSBURY:—

I cannot help thinking that the question which is raised upon art. 9 of this agreement is absolutely free from doubt. I think

that when the words "lower than those stipulated in this agreement" and "a corresponding reduction in the rates," spoken of in the latter part of the clause, are looked at, it is luce clarius that what the parties were contemplating was the proportionate relation of the charges to be made to the work to be done by the company. Therefore I am of opinion that the first contention of the appellants here must fail.

With reference to the 11th clause I confess myself unable quite to follow the reasoning of the Sheriff Substitute and to some extent of one of the learned judges in the Court below, but I do not propose to give any exposition of my own of this 11th clause, because I believe that the materials are not before us which would sufficiently enable us to form a precise notion of what the clause contemplates. It is enough in this case to say that I think it would be an unreasonable construction of the agreement as it stands to suppose that clause 11 is intended to override and control the effect of clause 9. I can conceive of a number of circumstances, and amongst them I can conceive of an agreement with the Eglinton Company, such as would render the provision of clause 11 not an unreasonable and not an unintelligible one, saving nevertheless all the rights which are conferred by clause 9 upon the parties to this agreement.

Under these circumstances I quite concur in the judgment which has been moved.

Interlocutor appealed against affirmed; and appeal dismissed, with costs.

Lords' Journals, 22 June, 1886.

Agent for appellants: *W. A. Loch, for John Clerk Brodie & Sons, W.S., Edinburgh.*

Agents for respondents: *Durnford & Co., for James Robertson, Kilmarnock.*

[HOUSE OF LORDS.]

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COUNTESS DOWAGER OF KINTORE AND OTHERS . . . . . } APPELLANTS;

AND

EARL OF KINTORE . . . . . RESPONDENT.

Parent and Child—Entailed Estates—Legitim—Exclusion of Apparent Heir in Ante-nuptial Contract of Marriage—5 Geo. 4, c. 87, ss. 4, 5; 11 & 12 Vict. c. 36, s. 32.

Although the right of children may be barred or excluded altogether, either by direct renunciation between their father and them, or by an express exclusion of their right in the ante-nuptial contract of their parents, yet their right cannot be barred by inference or implication.

By ante-nuptial contract of marriage between the settlor, the heir in possession of entailed estates and his intended wife, dated 1851, the settlor, after reciting sect. 4 of the Aberdeen Act (5 Geo. 4, c. 87), granted provisions in favour of the children of the marriage, other than and excluding the heir who should succeed to the entailed estates; he also appointed tutors to the children, and, inter alia, gave directions as to the maintenance and education of the heir as well as the other children, "which provisions before conceived in favour of the children of the marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim, portions natural:" &c.

Held, affirming the decision of the Court below, that the claim of the eldest son and child of the marriage who succeeded to the entailed estates to legitim was not barred by the marriage contract.

Acquiescence.

A son remained in ignorance of his right to legitim for nearly three years after his father's death: and all parties acted as if legitim was not due.

Held, the son's claim to legitim was not barred by acquiescence.

APPEAL from the First Division of the Court of Session, Scotland.

The questions raised were (1) whether the respondent, the Earl of Kintore, is barred by the terms of his father's ante-nuptial contract from claiming one-half of the free moveable estate which belonged to his father the late Earl of Kintore, in the name of legitim, and if not (2), whether he is now barred from claiming it by his actings.

The appellants are his mother the Dowager Countess of Kintore, and his one brother and three sisters.

The late Earl of Kintore, then heir of entail in possession of the family estates, was married to the appellant, the Dowager Countess of Kintore, on the 23rd of June, 1851. By their antenuptial contract of that date the deceased Earl made certain provisions for his intended spouse in the event of her survivance, which were to be in full satisfaction of terce and jus relictæ. Then the deceased Earl, after reciting the 4th section of the Aberdeen Act (1) bound and obliged

Himself and the heirs of entail who shall succeed to the said entailed earldom, baronies, and others in the county of Aberdeen and subsidiaries, his heirs and

(1) The 4th section of the Aberdeen Act (5 Geo. 4, c. 87, s. 4) provides :—

"And be it further enacted that it shall and may be lawful to the heir of entail in possession of any such entailed estate as aforesaid to grant bonds of provision of obligations, binding the succeeding heirs of entail in payment, out of the rents or proceeds of the same, to the lawful child or lawful children of the person granting such bonds or obligations who shall not succeed to such entailed estate, of such sum or sums of money bearing interest from the grantor's death as to him or her shall seem fit: provided always, that the amount of such provision shall in no case exceed the proportions following of the free yearly rents or free yearly value of the whole of the said entailed lands and estates, after deducting the public burdens, liferent provisions, including those to wives or husbands authorized to be granted by this Act, the yearly interest of debts and provisions, and the yearly amount of other burdens of what nature soever affecting or burdening the said lands and estates or the yearly rents or proceeds thereof, and diminishing the clear yearly rent or yearly value thereof as aforesaid to the heir of entail in possession; that is to say, for one child one year's free rent or value; for two children two years' free rent or value; and for three or more children three years' free rent or value in the whole: Provided always, that such provision shall, except in the settlement thereof by a marriage contract as hereinafter mentioned, be valid and effectual only to such child or children as shall be alive at the death of the grantor or to the child or children of which the wife of the grantor shall be then pregnant; and upon any such child succeeding to the entailed estate, the provision granted to him or her, in so far as not previously paid, shall be extinguished for ever, and shall never be set up as a debt against any succeeding heir."

Sect. 5: "Provided always, and be it further enacted, that if any child to whom any such provision as aforesaid may be granted shall marry, and that such provision, or any part thereof, shall, with the consent of the grantor of the same, be settled in the contract made in consideration of the marriage of such child, and such child so marrying shall die before the grantor of such provision, then and in all such cases the provision, or any part thereof, so settled in consideration of such marriage, shall remain and be effectual, as if such child had survived the grantor."

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successors whatsoever, to make payment to the child or children procreated of the said intended marriage, other than and excluding the heir, who shall succeed to the said Earl in the said entailed earldom, baronies, and others, and to the representatives of those children who shall predecease the said Earl claiming right in virtue of special settlement by marriage contract of the sums of money following, viz.: If there should be one child, other than the heir as aforesaid, of the sum of £5000; if there should be two children, other than the heir as aforesaid, of the sum of £10,000; and if there should be three or more children other than the heir as aforesaid, of the sum of £15,000; As also the said Earl further binds and obliges himself, and the heirs who shall succeed to him in the said lands, baronies, and estates in the counties of Kincardine and Forfar and subsidiaries, his heirs and successors whatsoever, to make payment to the said child or children other than and excluding the heir who shall succeed to the said Earl in the said last-mentioned lands, baronies, and estates, and to the representatives of those children who shall predecease the said Earl, claiming right in virtue of special settlement by marriage contract: if there shall be one child, other than the heir as aforesaid, £9000; if two, other than the heir aforesaid, £18,000; and if three or more, of the sum of £27,000.

The Earl then proceeds to appoint tutors and curators to his children in the event of their being in pupillarity or minors at the time of his death. And that the tutors, &c., should have power to appoint factors, to grant leases of land not exceeding nineteen years, &c. And declaring that the tutors, &c., should be accountable for their actual intermissions only, nor liable for omissions. And further, that the tutors or curators shall be bound to pay over to the party appointed to have the immediate superintendence of the children such a sum out of the rents and profits of the said entailed baronies, lands, and others as they may consider proper for the maintenance and education of the heir, who shall succeed to him in the said entailed properties, and for upholding an establishment suitable to his age and rank, so long as the said heir may be in minority. He provides also that the custody of the children until they attain majority shall be in the hands of the mother; and that in the event of her marrying again, the tutors, &c., were to satisfy themselves of completeness of the arrangements made for the comfort and welfare of the said children; of their education in the Protestant faith; and of the due application of the sums paid for their maintenance and education.

Then came the clause on which the question here arises:—

Which provisions before conceived in favour of the children of the marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear,

legitim, portions nature, executory, and everything else that they could ask or claim by and through the decease of their father or the predecease of their mother, in any manner of way, their father's goodwill only excepted.

The late Earl died on the 18th of July, 1880, leaving a last will, by which he nominated the Dowager Countess, in case she should survive him, sole executrix and universal legatory; and by a codicil he bequeathed to her all expenditure by him on the entailed estates not charged thereon at the time of his death. He also left a last disposition, dated the 6th of September, 1875, by which he conveyed his whole heritable estate to trustees (1) for payment of his heritable debts affecting, or which may affect the heritable estate before disponed, including the foresaid provisions to my said Countess and young children, in so far as they are not exigible from the entailed estate, or from my eldest son who may succeed me in the present entailed estates, or in those remaining entailed at my death; (2) for paying and implementing any obligations in favour of the respondent relative to the disentail of part of Haulkerton estate; (3) for payment of £1000 to his youngest daughter; and (4) for payment of the whole residue to his younger children.

On the marriage of the respondent in 1873, under his marriage contract the late Earl agreed to pay his son £1000 a year, and provided that in the event of his (with the consent of the son) disentailing and acquiring in fee simple a portion of the entail of Haulkerton in order to sell the same, that any additional income should be divided between them.

It was agreed to disentail a part of the estates.

By an agreement in 1875 it was arranged that the price of the lands sold should be divided in the proportion of fifty-eight to the late Earl and forty-two to the respondent. The marriage contract of 1873 also provided a provision for the respondent's wife, if she survived the respondent. Also to make payment to the child or children of the respondent who should not succeed to the entailed estates certain sums, payable and bearing interest during the late Earl's life, after the death of the respondent in terms of the statute.

After the father's death the Dowager Countess gave up to the respondent the furniture of Keith Hall and Inglismoldie, and

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gave to his wife £2000; she alleged she did this under the belief that he had no claim on the executry.

On the 2nd of July, 1883, the respondent raised this action concluding to have it found and declared that he was entitled to one half of the free moveable estate of the late Earl in the name of legitim. He averred that by his parents' contract of marriage no provision of any kind was made in his favour: that the only provision then being made being in favour of the Countess and younger children; that the right of the Countess Dowager to jus relictæ was renounced and excluded by the contract; that therefore the legitim consisted of one half of the free moveable estate of the deceased Earl; and the right of the younger children to any share to legitim being also excluded, that he was in consequence entitled to the whole legitim fund.

It was stated at the bar that the sum in dispute was about £22,000.

The respondent pleaded in reference to the arrangement under his marriage conduct, that instead of deriving any benefit from it he was a considerable loser by it. Also that the sum of £2000 referred to was presented by the appellant, the Dowager Countess, to the Countess as a gift: that the articles in the mansion-houses were transferred to him by the Dowager Countess also as a gift; but as both parties were at the time in ignorance of the legitim claim, he offered to give credit for the full proved value thereof.

The appellants lodged defences to this action, and pleaded, inter alia, that on a sound construction of the marriage contract the respondent's claim to legitim was effectually excluded; or, secondly, that if he was entitled, he was now barred by his actings.

It appeared the parties had not different law agents further than that of father and son, members of the same firm.

On the 5th of February, 1884, the Lord Ordinary (Fraser) held that the respondent was not excluded by the marriage contract from claiming legitim, and that he was now entitled thereto, and that the same amounted to one half of the personal estate of his late father. He also found the averments stated in defence against such claim to be irrelevant (1).

(1) 11 Court Sess. Cas. 4th Series, 1013.

On a reclaiming note to the First Division of the Court of Session, their Lordships, on the 20th of June, 1884, adhered.

On appeal,—

May 7, 10, 11. Sir *H. Davey*, S.G., and *The Solicitor-General for Scotland* (*Asher*, Q.C.), with them, *R. Wallace*, for the appellants:—

No doubt it has been settled that a mere provision to a child will not exclude legitim unless there is an express exclusion: *Breadalbane Case* (1): Also the exclusion of some children enures to the benefit of those not excluded, and the same result follows when such claim is renounced before the father's death: *Hog* v. *Lashley* (2); but a renunciation, or rather an assignation, after the death of the father, when legitim is due, does not enure to benefit of the other children: *Fisher* v. *Dixon* (3). In *Maitland* v. *Maitland* (4) it was held that the benefit given in lieu of legitim need not be a pecuniary one, and also that a contingent benefit will do. That case arose out of an ante-nuptial contract of marriage which had been entered into with Alexander Gibson Maitland, who was then the next heir to entailed estates, and his intended spouse. In this contract Mr. Maitland bound himself so soon as he came into possession of the estates to complete his title thereto and execute all proper deeds for conveying to "the eldest child, and other children of the marriage the said estates in terms of the said entails, and for securing" his wife and "the younger children" "in the full provisions allowed by the said entail." And further, "in case that a child or children shall be procreated of the said marriage, besides the heir who shall succeed to the said estates, to make payment to him, her, or them, of the sums following." And then follows a clause as follows: "And which provisions before written conceived in favour of the children of the marriage, are, and shall be, in full satisfaction" of legitim, &c. Mr. Maitland predeceased his mother, who was in possession of the estates, and they never came into his possession. The Court held that the

(1) 2 Sh. & McL. 377.

(2) 1791. H. of L. 3 Pat. App. 247.

(3) 2 Court Sess. Cas. 2nd Series, 1121; 2 Bell's App. 62. See also cases on custom of London as to orphan's portion: *Morris* v. *Burroughs*, 1 Atkins, 402; *Ives* v. *Medcalfe*, 1 Atkins, 63.

(4) 6 Court Sess. Cas. 2nd Series, 244.

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contract excluded all the children, including the eldest son, from legitim.

Lord Mackenzie said:—It is unnecessary to exclude legitim in an ante-nuptial contract of marriage to give in lieu of it a substantial provision. Lord Fullerton said:—"It may be true that the father chose to give the eldest son very little. But suppose he had cut him off with sixpence, that circumstance would not have entitled us to hold that the exclusion from legitim did not include him. He has got something under the contract, however little, and that makes him a beneficiary under it."

And consequently the question here is reduced to this; not whether there is a provision in the strict sense of the term, but whether there is in the deed what the spouses regarded as a provision in so far as the eldest son was concerned.

[LORD BLACKBURN:—Whether the father could cut off a child in his ante-nuptial marriage contract without any provision is not necessary to decide, as it does not arise (1).]

In the clause to "the child or children of the marriage" except the child who succeeded as heir to the entailed estates, the words "the child or children" plainly included *all* the children. For it could not be said to be in favour of all the children except the eldest son individually: and the word "provisions" in the clause excluding legitim might mean anything for the advantage of the child.

Now under sect. 5 of the Aberdeen Act, 5 Geo. 4, c. 87—passed for the very object of creating a fund which the children could settle—the respondent had a power to settle provisions in his own marriage contract on his younger children, no doubt with the consent of the grantor of the provision, and if he afterwards died before his father—the heir of entail in possession—his children other than he who succeeded to the estates would participate as his representatives in this provision. For the child who "shall succeed" to the entailed estates, could not mean one who had predeceased the heir of entail in possession.

Then, again, if the estates were disentailed under the Ruther-

(1) The Lord Ordinary dealt with the question at length. See 11 Court Sess Cas. 4th Series, 1013.

furd Act, 11 & 12 Vict. c. 36, and part of these estates was disentailed, it could not be predicated that Lord Inverurie, the respondent, succeeded to the entailed estates, therefore also in those circumstances he could claim a share. Another benefit accruing to the eldest son, was the special arrangements as to the tutors; collections of rents during minority; and education of the eldest son; for although, not a pecuniary benefit, these arrangements were set out in great detail and were intended for the respondent's benefit.

[LORD WATSON:—It must be something which creates a jus crediti in the heir.]

At all events if there was the intention to exclude the eldest son, as the Lord Ordinary thought, though without giving him any benefit, the respondent resting on the contract as a bar to his brother and sisters, must give effect to that intention, and that was where approbate and reprobate came in.

J. P. B. Robertson, Q.C. (with him *Darling*), for respondent, were directed to confine their argument to the point, that supposing the estates were disentailed, whether the respondent would have been entitled to take his share of this fund.

The marriage contract was peculiar in this way, that it does not propose to dispose of any particular estate in favour of the children; but it at once proceeds to assert that one of the children will succeed, and then specifies the provisions which are to come out of the entailed estates, treating them as a funded estate. Supposing Lord Kintore had three children, if no disentail the obligations are to be £10,000, but if it is disentailed, then, according to the appellants' argument, the heirs of the entail or their representatives would be liable to pay not £10,000 but £15,000, because of an additional child; but a subsidiary obligation cannot be for a larger sum than a primary obligation.

[LORD BLACKBURN:—There is nothing in the deed to shew that they contemplated a disentail, but they must be taken, from the date, to know that there might be a disentail.]

They never contemplated a disentail; and very unlikely considering the conditions under which it could be carried out.

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It must be done before the respondent's birth, and the Court had to be provided with particulars. The right to legitim is strong in the law of Scotland, and to exclude it there must be a clear and plainly expressed intention to that effect in the ante-nuptial contract.

The Solicitor-General for Scotland, in reply.

Time having been taken, judgment was delivered as follows :—

LORD HERSCHELL, L.C. :—

It seems clear that the respondent is entitled to his claim of legitim unless that claim has been expressly excluded by the marriage contract of his parents. The question, therefore, is, whether the clause in the marriage contract, which undoubtedly excludes legitim in the case of the other children of the marriage, excludes it in the respondent's case also. The clause is in these terms :—[His Lordship read it.]

Now I fully agree with what was said by more than one of the learned judges in the cases of *Maitland* v. *Maitland* (1) and *Keith's Trustees* v. *Keith* (2), that the words: "the children of the marriage" in such a clause are general words primâ facie applying to all the children of the marriage. It strikes me, too, that the object of such conditions in a marriage contract is, as was said by Lord Curriehill in *Keith's Trustees* v. *Keith* (2), "to fix the amount of what the wife and the issue are to have right to claim from the estate of the husband and father, leaving all the rest at his own disposal." "The party in whose favour the discharge of the legitim is intended to operate," he continued, "is the father himself, and not any of the children; and it would be a strange result if a condition intended to relieve the father's estate from a claim of legitim should leave his estate still subject to that claim, and merely transfer the right to it to the heir of the marriage. Such a construction cannot be put on such a clause unless it will not fairly admit of a more reasonable reading" (3). I confess, therefore, I approached the construction

(1) Dec. 14, 1843. 6 Court Sess. Cas. 2nd Series, 244, and 16 Scot. Jur. 162.

(2) July 17, 1857. 19 Court Sess. Cas. 2nd Series, 1040; 29 Scot. Jur. 497.

(3) 19 Court Sess. Cas. 2nd Series, p. 1063.

of the settlement with the expectation of finding some provision conceived in favour of all the children of the marriage. I do not think this necessarily means a provision for a money payment. If under the terms of the settlement any right were conferred upon the eldest son to which he would not otherwise have had a legal title, it appears to me that this would properly be described as a provision conceived in his favour. But upon a careful consideration of the arguments urged at the bar, I have been unable to arrive at the conclusion that any right has been acquired by the respondent to which he could not otherwise have laid claim, and I think it follows upon a true construction of the clause relating to legitim that his right to legitim is not excluded.

In the arguments urged on behalf of the appellants, reliance was first placed on the provisions relating to the education and maintenance of the heir. But these do not secure to him any right to which he was not otherwise entitled. Next it was said that, even though the respondent was himself excluded from the pecuniary provision made for the children of the marriage, he still came within the terms "children procreated of the intended marriage," and that if he had predeceased the Earl having made a settlement by marriage contract, his representatives might have obtained in certain events the benefit of the provision. I desire to reserve my opinion whether, if a settlement had been lawfully made upon his marriage and he had predeceased his father, the children of such marriage might have obtained the benefit of a portion of the sum charged on the entailed estates. It is not in my opinion necessary for the determination of the present case to decide that question. For it appears clear that such a marriage contract by a child cannot be validly effected without the consent of the father. And the late Earl of Kintore came under no obligation by the marriage contract which we have to construe to give his consent. I think it is impossible to say that a provision in the settlement which could only become effectual so far as the respondent was concerned by the subsequent consent of the settlor, which consent the settlor was free to give or to withhold, is a provision conceived in favour of the respondent within the meaning of the clause excluding legitim.

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The remaining argument of the appellants was that a provision was secured to the respondent by the settlement in case his father disentailed the estates under the Rutherfurd Act. It was urged that in that event, not being excluded as "the heir succeeding" to the entailed estates, he would have been entitled to share as one of the children of the marriage. I am not prepared to say that under no form of settlement could such an argument prevail. I desire to leave the point open for consideration, should it hereafter arise. But the effect of bringing in the heir in the case of a settlement, couched in the terms of that now in question, might be to increase the amount of the charge, and I do not think it is possible to hold that the burthen upon the entailed property or the subsidiary obligation on the settlor's heirs and successors could be increased by the disentail. I think, therefore, that a construction which might involve such a consequence cannot prevail.

I think that there is no sufficient ground to support the contention that the claim of legitim has been barred by acquiescence. Upon the whole, therefore, I move that the interlocutor appealed from be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN:—

At the close of the argument I had come to the same conclusion at which the Lord Chancellor has arrived: and since the case was argued I have had an opportunity of reading in print the opinion of my noble and learned friend Lord Watson, which will be delivered directly, and in it I agree so thoroughly that I do not think it necessary to add anything.

LORD WATSON:—

It has not been disputed that, according to the law of Scotland, a child's claim to legitim cannot be barred by inference, but only by direct renunciation, or by express exclusion of the right in the ante-nuptial contract of the parents. In the present case, I think the Lord Ordinary and the judges of the First Division were right in the holding that the clause of exclusion occurring in the marriage contract of his father, the late Earl of Kintore

dated the 23rd of June, 1851, does not expressly bar the respondent's claim, unless it can be shewn that, by the terms of the contract, the respondent took some pecuniary or other benefit which can, in a reasonable sense, be considered a "provision" within the meaning of the clause.

I am also of opinion, and for the same reasons which were assigned by the judges of the Court of Session, that an exercise of the patria potestas, consisting in the appointment of tutors to a pupil heir of entail in possession, with directions as to his religious education and his maintenance out of the rents of the entailed estate, does not constitute in any proper sense a provision by the father to the child. The appellants did not maintain in either of the Courts below that, apart from such appointment and directions, the marriage contract made any provision whatever in favour of the respondent, who was the eldest son and child of the marriage, and accordingly it appears to me that, upon the arguments which were addressed to them, the interlocutors of both Courts were well founded.

But it has been argued here that the money provisions made by the late Earl in the marriage contract of 1851, under the statutory powers conferred upon him by the Aberdeen Act (5 Geo. 4, c. 87), are such as would, in certain possible events, have enured to the benefit of the respondent, and were, therefore, although contingent upon circumstances which did not occur, provisions conceived in his favour within the meaning of the clause excluding legitim. It was said, in the first place, that a share of these provisions might, during the lifetime of his father, have been effectually settled by the respondent in his own contract of marriage; and, in the second place, that, in the event of his father having, before his birth, disentailed the estates of Kintore and Haulkerton, under the powers of the Rutherfurd Act (11 & 12 Vict. c. 36), the respondent would have been entitled to a share of these provisions, along with the younger children of the marriage, upon the same condition which attached to their right, namely, survivance of their father, the settlor.

By the marriage contract the late Earl, upon the recital of sect. 4 of the Aberdeen Act, bound himself, and the heirs of entail who should succeed him in the estates of Kintore and Haulkerton,

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to make payment to the children procreated of the marriage, other than and excluding the heir who should succeed to him in the entailed estates, and to the representatives of children who should predecease him, claiming right in virtue of special settlement by marriage contract (such provisions bearing interest in terms of the statute, and payable one year after his death), of the sum of £5000 if there should be one child other than the heir, of £10,000 if there should be two children other than the heir, and of £15,000 if there should be three or more children other than the heir. Although sect. 5 of the Aberdeen Act is not recited or mentioned, its enactments are plainly referred to in the expression "special settlement by marriage contract." The Earl also bound, subsidiarie, his own heirs and successors for these provisions. That secondary obligation imports nothing more than a liability to make good to children or their representatives, entitled under the Aberdeen Act, any deficiency in the amount settled upon them, arising from a fall in the rental of the entailed estates.

As I construe the provisions of sect. 4 of the Aberdeen Act, the heir apparent, the eldest-born son of the marriage, can never become an object of the power thereby conferred upon the heir in possession. The clause contemplates the continuance of the entail, and the only obligation of payment which it imposes is laid upon future heirs succeeding and possessing under the fetters of the entail. The provisions which it authorizes are not made a burden upon the fee of the entailed estate, but are only recoverable out of rents arising during the possession of a tailzied fiar. Two conditions are, inter alia, attached to the right of a child to take a share of these provisions; the one being, that he shall not succeed as heir of tailzie on his father's death, and the other that he shall survive his father. The eldest-born son can never be, at any moment of his life, in a position to fulfil these conditions. If he survived his father he would necessarily succeed to the estate, and, if he predeceased, he could have no claim. A younger son is in a different position; he is, from the time of his birth, and so long as he has an elder brother, a child in whose favour a provision may be made in virtue of sect. 4, although the provision is contingent upon his surviving his father, and his not being, at the time of his father's death, the heir entitled to succeed.

It was, however, argued that, although the respondent could never have been himself entitled to participate in these provisions, he might yet have taken benefit from them, if a share had been settled by his own marriage contract, in terms of sect. 5 of the Aberdeen Act, and he had thereafter predeceased his father. That argument is not, in my opinion, warranted by the terms of sect. 5. The enactments of that section are only applicable in the case where "any child to whom any such provision as aforesaid may be granted shall marry;" and as I read the preceding section, the heir apparent is not a person to whom, upon any contingency, such a provision could be competently granted. Moreover, the settlement in the child's marriage contract is only declared to be as effectual "as if such child had survived the grantor." In the case of an eldest-born son, I am, as I have already said, of opinion that such a provision could not have been effectual in the event of his surviving the grantee. But assuming it to be possible, under sect. 5 of the Aberdeen Act, to make such a settlement as it contemplates, which will be effectual, in the marriage contract of an heir apparent who predeceases his father, I do not see how that possibility can aid the appellants' argument. Such a settlement by the marriage contract of a child is, in all cases, ineffectual without the consent of the father; and the marriage contract of 1851 imposes no obligation upon the late Earl of Kintore to give such consent to the respondent, or to any of his children. If it be a benefit which might have been conferred on the respondent, under the powers of the Aberdeen Act, it has not been brought into settlement by his parents, or provided to him by their marriage contract. The terms of the contract left the late Earl as free to give or withhold that benefit, as to give to or withhold from the respondent his fee simple lands which are not mentioned in the contract.

The next argument of the appellants was founded upon the Rutherfurd Act of 1848, which gave to heirs in possession under an entail dated prior to the 1st of August, 1848, power to disentail with the consents of the three nearest heirs for the time being entitled to succeed, provided the next in succession should be of the full age of twenty-five years, and not subject to any

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legal incapacity. It does not appear that the late Earl was in a position to avail himself of that power at any time between the date of his marriage contract and the birth of the respondent; but it was within the limits of possibility that he might have been so. In these circumstances counsel for the appellants maintained that the effect of disentailing the Kintore and Haulkerton estates between these dates would have been to give the respondent, who could never, in that event, have become entitled to succeed under the entail, a right to share in the provisions made by the marriage contract under the Aberdeen Act.

The suggestion that, after the passing of the Rutherfurd Act, provisions made in terms of sect. 4 of the Aberdeen Act become available to the heir apparent of tailzie, who would have succeeded his father as heir in possession, had it not been for the disentail of the lands before he came into existence, appears to me to be founded on a misconception of the enactments of the statute of 1848. In my opinion, the purpose of that Act was to give to heirs in possession disentailing, with or without consents, power to acquire the entailed estate in fee simple, and to destroy absolutely the rights of succession of all heirs substitute of tailzie; but at the same time to preserve intact all other rights and claims, whether present, future, or contingent, which had, at the time of the disentail, been made valid charges either upon the fee of the estate, or upon the interest of succeeding heirs of entail. That such was the purpose of the Act is an inference which may be derived from many of its clauses; but sect. 32, which defines the legal effect of an instrument of disentail when duly executed and recorded, appears to me to be conclusive. It enacts that the estate shall thereupon be disencumbered of the whole fettering clauses of the entail, and that the heir disentailing shall be entitled to alter the course of succession prescribed by the tailzie, to alienate and dispone onerously or gratuitously, to burden with debt, and to do any other act or deed competent by law to any absolute proprietor in fee simple. The heir of entail continues, notwithstanding the execution and recording of the instrument, to be heir under the tailzied investiture, but his right of succession is reduced to that of a simple substitute, and may be defeated

at will by the heir disentailing. On the other hand, sect. 32 expressly provides that the instrument of disentail shall in no way defeat, or affect injuriously, charges, burdens, or incumbrances, or rights or interests held by third parties, and lawfully affecting the fee or rents of the estate, or the heir disentailing or his successors, other than the rights and interests of the heirs substitute of entail; and it further declares that all such charges, burdens, and incumbrances, and rights and interests, other than as aforesaid, shall remain at least as valid and operative in all respects as if no instrument of disentail had been executed or recorded. Provisions to children under the Aberdeen Act are burdens, not upon the estate, but upon succeeding heirs of tailzie; and, standing the entail, the heir apparent who survives the heir in possession is debtor and not creditor in the obligations which they impose. To admit him as a creditor, because the estate has been disentailed, would, I conceive, be contrary to the enactments of sect. 32. The effect of bringing in the heir as a creditor, in the event of there being one or two other children alive at the death of the settlor, would be to increase the amount of the provisions, and create a charge which could never have affected heirs of entail; and, in the event of there being three or more other children alive at that date, would be to diminish the amount to which each of such children would have been entitled had the entail subsisted.

For these reasons I am of opinion that the new arguments addressed to the House on behalf of the appellants fail to establish that any provision was made by the marriage contract of 1851 in favour of the respondent. I do not think it necessary to notice in detail the appellants' contention that the respondent's claim to legitim is barred by acquiescence. The facts of the case afford no foundation for such a plea. It is not alleged that the respondent was aware of his rights before he preferred the claim which these proceedings were brought to enforce: and the circumstances of the case, as appearing from the record and productions, seem to me to afford a sufficient explanation of the fact that he remained in ignorance of his rights for a considerable time after his father's death. Other questions of importance

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relating to the law of legitim were discussed in the course of the argument, but, seeing that, in the view of the case which I have taken, none of these arise for decision, I express no opinion with regard to them.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, June 29th, 1886.

Agent for appellants: *Andrew Beveridge, for Francis Edmond, Advocate, Aberdeen, and Morton, Neilson, & Smart, W.S., Edinburgh.*

Agents for respondent: *Martin & Leslie, for Alexander Edmond, Advocate, Aberdeen, and Murray, Beith, & Murray, W.S., Edinburgh.*

[PRIVY COUNCIL.]

DE JAGER AND ANOTHER . . . . . PLAINTIFFS; J. C.*
1886
AND
DE JAGER . . . . . DEFENDANT. Feb. 25.

ON APPEAL FROM THE HIGH COURT OF APPEAL OF THE COLONY OF THE CAPE OF GOOD HOPE.

Law of the Cape of Good Hope—Codicil—Construction.

A testator and testatrix who had been married in community of property devised by codicil certain real estate to their two sons, with provisoes, first, in restraint of alienation; second, "the eldest son among our grandchildren shall always have the same right thereto, and after the decease of their parents remain in possession thereof, with this understanding however, that the other heirs who may still be born shall enjoy equal share and right thereto . . . . to be for the convenience and benefit of our two children and grandchildren, so that always the eldest son of the grandchildren has the privilege, ... and the grandchildren can in our opinion earn their living thereon."

No other son was born, the younger entered into possession of half the property and died leaving ten children:—

Held, that the respondent, who was the eldest of these ten children, was entitled to the whole of his father's moiety.

Quære, as to the true construction of the codicil if there were any attempt to create a perpetuity or entail.

APPEAL from a judgment of the Court of Appeal (June 30, 1884), affirming a judgment of the Circuit Court of Oudhtshoorn (April 4, 1884).

The question raised by the appeal was, what is the true construction of the codicil set out in their Lordships' judgment.

T. L. Wilkinson, for the appellants.

Warmington, Q.C., and *Byrne*, for the respondent.

The judgment of their Lordships was delivered by

SIR RICHARD COUCH:—

The question in this appeal arises upon the construction of a codicil to the will of Carl Johannes de Jager and his wife

* *Present*:—THE LORD CHANCELLOR (LORD HERSCHELL), LORD BLACKBURN, LORD HOBHOUSE, and SIR RICHARD COUCH.

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Susanna, who were married in community of property. The codicil was dated the 19th of July, 1822, and was in these words:—"We, the undersigned testators of this our testament or last will, before written, having taken into consideration that it would be necessary and useful for our children and grandchildren who shall survive us to add the subjoined to this our testament as follows: We desire expressly and bequeath by these presents to our two children procreated in wedlock, named Gideon Carolus Johannes de Jager and Johannes Stephanus de Jager, our dwelling place named Buffel's River, situated on the Oliphants River, in the district of George, as also a certain piece of ground lying on the lower side of the above-named dwelling place, and thereunto adjoining (now also surveyed), with this understanding, however, that our two above-mentioned children may not sell, exchange, or pledge, or in any way dispose of the same, and that always this above-mentioned bequest of our dwelling place, together with the adjoining piece of quit-rent land, shall remain in the first place for both of them, and secondly, the eldest son among our grandchildren shall always have the same right thereto, and after the decease of their parents remain in possession thereof, with this understanding, however, that the other heirs who may still be born shall enjoy equal share and right thereto. Wishing and desiring we, the testators, this only to be our object, not to let the before-mentioned bequest fall into other hands, but to be for the convenience and benefit of our two children and grandchildren, so that always the eldest son of the grandchildren has the privilege. And since the place is provided with a strong stream of water and with sufficient serviceable soil, the grandchildren can, in our opinion, if God grants his blessing, earn their living thereon."

At the time of this codicil being made the testator and testatrix had the two children named in it, and the younger of the two, Johannes, appears to have been about the age of nineteen years. It does not clearly appear that the testator and testatrix might not then have reasonably thought that there was no possibility of another child being born. The wife, who survived her husband, died in 1825, leaving the two sons surviving and not having had any other children.

After the death of the testatrix the elder son Gideon entered into possession of the half of the property, and the question in the appeal arises upon the rights of the parties to the suit to the other half. Johannes, the younger son, died on the 18th of July, 1876, leaving him surviving ten children, the respondent being the eldest of them, the appellants being two of the remaining children, and the others not being parties to the present suit.

The appellants, who brought the suit, claim, upon what they contend is the right construction of this codicil, to be entitled each of them to a tenth share of the half which came to Johannes. On the other hand the respondent, the eldest son, contends that he under the terms of the codicil is entitled to the whole of that share.

Now in construing this codicil it is important to look to what is the general intention apparent upon the face of it. It is expressed by that part of it which says: "Wishing and desiring we, the testators, this only to be our object, not to let the before-mentioned bequest fall into other hands, but to be for the convenience and benefit of our two children and grandchildren, so that always the eldest son of the grandchildren has the privilege. And since the place is provided with a strong stream of water and with sufficient serviceable soil, the grandchildren can, in our opinion, if God grants his blessing, earn their living thereon."

In the argument for the appellants the introductory words were relied upon, but either construction which is contended for would be consistent with them, because supposing the gift is for the benefit of the eldest among the grandchildren, it would be consistent with the wish which is expressed there. So also with regard to what comes at the end of the codicil, that the grandchildren should earn their living upon the farm; that would be consistent with the eldest son among the children of each of the sons taking it and earning his living there; and perhaps the intention rather was that that should be the case, because the testator and testatrix could judge whether, if their farm was divided into two parts to be enjoyed by the two sons and afterwards each part by one of the grandchildren, or it might be if a third son was born then into three parts, it would be better

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capable of supporting the family than if it was to go, one portion of it to be divided between the children of Gideon, and the other portion between the children of Johannes.

Now to look more closely at the words of the codicil. The first part gives clearly an estate to the two sons who were living, and named in it, for an interest which is in terms indefinite, but which, having regard to the ulterior gifts, must be for life, and then it proceeds: "and secondly, the eldest son among our grandchildren shall always have the same right thereto,"—that must mean the right which had been given to the two sons—"and after the decease of their parents remain in possession thereof." So far there is a distinct indication of an intention that they were to take the property in the two shares; that the eldest son of each of the sons was to take the property in the shares in the same way as the fathers were to take, "with this understanding, however, that the other heirs who may still be born shall enjoy equal share and right thereto." It is contended that these words, "other heirs," should not be read as applying to children who might be born after the making of the codicil, but that they have reference to grandchildren, and possibly even beyond grandchildren. It appears to their Lordships that the natural construction of these words is, that it was intended to provide for what might have been suggested to the testator and testatrix, if it did not occur to themselves, that another child might possibly be born, and it was necessary to make some provision for that event happening. Their Lordships think they were inserted to provide for that case. Then come the words, "but to be for the benefit of our two children and grandchildren." If those words are taken in connexion with what has gone before, they may mean grandchildren who are the subject of the previous gift, namely, the eldest among the grandchildren. These would be the eldest sons of each of the sons. The words "two children and grandchildren" are satisfied by that construction, and that construction should be put upon them to avoid the inconsistency which would be created by giving them a different construction in the previous gift to the sons. Then it goes on, "so that always the eldest son of the grandchildren has the privilege." These words again point to the construction that it was the eldest

son of the grandchildren who, in the prior passages of the will, was contemplated as the sole taker. In immediate connexion with this direction that the eldest son of the grandchildren was to have the privilege, come the words, "the grandchildren can, in our opinion, if God grants his blessing, earn their living thereon," to which reference has already been made. So that looking at the whole of this codicil, it appears to their Lordships that the construction which has been put upon it by the Courts below is the right one. The case was heard in the first instance by Mr. Justice Buchanan, who put that construction upon the codicil, and upon an appeal to the full Court the Judges, with one exception, came to the same conclusion.

It may be well to observe that it is not necessary for their Lordships to say what would be the construction of this codicil with regard to any attempt, if there should be one, to create a perpetuity, or what has been called an entail. That question does not now arise, and their Lordships give no opinion upon it. Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed, and the appellants must pay the costs of the appeal.

Solicitors for the appellants: *Venning, Sons, & Mannings.*
Solicitor for the respondent: *A. Wells.*

[HOUSE OF LORDS.]

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THE JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER. . . . . } APPELLANTS;

AND

THE IMPROVEMENT COMMISSIONERS FOR THE DISTRICT OF NEWTON IN MAKERFIELD . . . . . } RESPONDENTS.

Highway—Highways and Locomotives (Amendment) Act 1878 (41 & 42 *Vict. c.* 77) *s.* 13—*Disturnpiked Road—Cesser of Turnpike Road—Main Road —Towns Improvement Clauses Act* 1847 (10 & 11 *Vict. c.* 34) *ss.* 47, 49, 50, 51.

In 1855 a portion of a turnpike road was included in an improvement district under a local Act incorporating the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34). Thereupon by virtue of sects. 47–51 of the latter Act the maintenance of this portion of the road became vested in the improvement commissioners and the turnpike trustees ceased to have power to collect tolls or lay out money upon it. In 1877 the turnpike trust expired. The commissioners were the "highway authority" for the district, and the district was a "highway area" within the meaning of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77) s. 13:—

Held, affirming the decision of the Court of Appeal (15 Q. B. D. 25), that notwithstanding the operation of sects. 47–51 of the Towns Improvement Clauses Act 1847 the road only "ceased to be a turnpike road" and became a "main road" within the meaning of sect. 13 of the Highways and Locomotives (Amendment) Act 1878 upon the expiration of the turnpike trust; and that since that event happened after 1870 the county authority was liable to pay to the commissioners one-half the expenses incurred by them in the maintenance of the portion of the road within their district, as provided by s. 13.

APPEAL from a decision of the Court of Appeal (1) upon a special case which is set out in the report of the decision of the Queen's Bench Division (2). For the present report the following outline of the facts is sufficient:—

The plaintiffs are the Improvement Commissioners for the District of Newton in Makerfield in the county of Lancaster (hereinafter called the commissioners), and are the highway

(1) 15 Q. B. D. 25. (2) 13 Q. B. D. 623.

authority for the district, and the district is a highway area within the meaning of the Highways and Locomotives (Amendment) Act 1878.

The defendants are the justices of the peace for the county of Lancaster and are the county authority as defined by the Highways and Locomotives (Amendment) Act 1878.

The commissioners were incorporated by the Newton District Improvement Act 1855, 18 & 19 Vict. c. c. which incorporates the Towns Improvement Clauses Act 1847, 10 & 11 Vict. c. 34. The district is traversed by a road running from south to north from Warrington to Wigan, which was maintained under the powers of several private Acts and was known as the Warrington and Wigan Turnpike Road.

Upon the passing of the Newton District Improvement Act 1855 the maintenance of all streets and highways within their district including the said road became vested in the commissioners by virtue of sects. 47, 49, 50 and 51 of the Towns Improvement Clauses Act. And the trustees of the turnpike road thereupon ceased to repair the road within the limits of the district.

The Warrington and Wigan turnpike trust expired in 1877.

Sect. 13 of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77) enacts that "For the purposes of this Act, and subject to its provisions, any road which has, within the period between the 31st day of December 1870 and the date of the passing of this Act, ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one-half of the expenses incurred from and after the 29th day of September 1878 by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction."

The commissioners brought this action in 1884 to recover £60 10*s.* 10*d.* being one-half of the expenses of the maintenance

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of the portion of the road within their district between the 25th of March 1882 and the 25th of March 1883.

The question for the opinion of the Court was whether the county authority was liable by virtue of the Highways and Locomotives (Amendment) Act 1878 or otherwise to pay out of the county rate the sum above demanded or any part thereof.

If the Court were of opinion that the county authority was so liable, judgment was to be entered for the plaintiffs with costs; otherwise for the defendants with costs.

The Queen's Bench Division (Mathew and Day JJ.) gave judgment for the plaintiffs (1), and this decision was affirmed by the Court of Appeal (Brett M.R., Cotton and Lindley L.JJ. (2)).

March 19, 22. Sir *J. Gorst* Q.C. and *H. F. Blair* for the appellants:—

If the decisions below are right the strange consequence is that although ever since 1855 the commissioners have managed the road within the limits of their district and have paid the whole of the expenses they are to be reimbursed one-half by the effect of sect. 13 of the Highways and Locomotives (Amendment) Act 1878. That cannot have been meant: there is not a trace of such an intention in the Act. The true view is that the road within the limits of the district "ceased to be a turnpike road" in 1855 when the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34) came into operation. Sects. 47 to 49 of that Act transferred the management and all duties of repair and otherwise with regard to the road within the district to the commissioners, and sect. 50 forbade the turnpike trustees to collect any tolls or lay out any money on that portion of the road. From that moment that portion of the road lost its turnpike character. Therefore the whole road from Wigan to Warrington could not in 1877 (when the turnpike trusts expired) "cease to be a turnpike road" within the meaning of sect. 13 of the Act of 1878, for the commissioners' portion had ceased in 1855 to be a turnpike road. This is the logical consequence of the decision in *Justices of Lancashire* v. *Mayor of Rochdale* (3) where it was held that "any road" in

(1) 13 Q. B. D. 623. (2) 15 Q. B. D. 25.
(3) 8 App. Cas. 494.

sect. 13 means any entire turnpike road, and not any part of such a road. Moreover the facts and dates when closely examined shew that that case is precisely parallel to the present, for it appears from the papers in the case (1) that as to one of the roads there dealt with, the Halifax Road, the turnpike trust expired in 1872, that is, between the 31st of December 1870 and the coming into operation of the Act of 1878. That decision, therefore, is an authority that when part of a turnpike road comes within the operation of sects. 47–50 of the Towns Improvement Clauses Act 1847, and afterwards the turnpike trust of the whole road expires between 1870 and 1878, sect. 13 of the Act of 1878 has no application. The decision in *Justices of West Riding* v. *Reg.* (2) so much relied on by the Courts below is distinguishable, for there the provisions forbidding the trustees to collect tolls or lay out money on two of the roads were contained in the Turnpike Acts themselves. As to the third road there was only an agreement. The question, therefore, which now arises of the effect of sects. 47–50 of the Towns Improvement Act 1847 was not considered in that case.

Some light may be thrown on the subject by s. 10 of the Annual Turnpike Acts Continuance Act 1874 (37 & 38 Vict. c. 95) to which it seems no one's attention was drawn in that case. That section shews the intention of the legislature that where trustees were not to expend money on the repair of a turnpike road, that road should cease to be repairable as a highway, that is, should cease to be a turnpike road and should be deemed to be a main road.

[The following cases were also referred to as to the meaning of "turnpike road": *Northam Bridge Company* v. *London and Southampton Railway Company* (3); *Reg* v. *East and West India Docks, &c., Company* (4).]

Dugdale Q.C. and *Alexander Glen*, for the respondents:—

The appellants' contention is altogether inconsistent with *Justices of the West Riding* v. *Reg.* (2) which is a conclusive

(1) See the judgment of Lord Herschell, L.C., post.

(2) 8 App. Cas. 781.

(4) 22 L. J. (Q.B.) 380.

(5) 6 E. & B. 428.

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authority as to the present case. So is the decision in *Justices of Lancashire* v. *Mayor of Rochdale* (1). The point now suggested as to the Halifax Road in that case was clearly not present to the minds of the Law Lords, for there is no reference to it in the judgments. The appellants' contention as to the construction of sect. 13 is inequitable: it would result in towns under the Towns Improvement Clauses Act 1847 being disqualified from claiming from the county a contribution towards the expenses of main roads within their boundaries, though they are admittedly liable to pay, through the county rate, their share of the expenses of main roads throughout the rest of the county. The legislature in the Act of 1878 intended to avoid this result, for those districts which were not intended to have the benefit of contribution from the county—viz., the Metropolis (sects. 2, 13); boroughs with separate quarter sessions (sects. 13, 14, 38); and overlapping portions of districts (sect. 19)—are expressly exempted from the corresponding burden of contributing through the county rate. The case of the Isle of Wight, deprived of the benefit of sect. 2, appears to have been an oversight, and to have been provided for as soon as the oversight was discovered, by being exempted from the burden by a special Act, 44 & 45 Vict. c. 72. As to the provisions of the Towns Improvement Clauses Act, the enactment that turnpike trustees shall not repair does not make the road cease to be a turnpike road: for many provisions of the Turnpike Acts continue to be applicable to the road; e. g. the penal clauses; they are not repealed, and they must therefore be enforceable. As to repair, the parish was always indictable, and unless the tolls more than satisfied the mortgage the trustees were not required to repair at all: see *Reg.* v. *Lordsmere* (2) and 4 & 5 Vict. c. 59.

Sir *J. Gorst* Q.C. replied.

The House took time for consideration.

July 30. LORD HERSCHELL, L.C.:—

My Lords, the point raised in this case may be shortly stated, but the determination of it is by no means free from difficulty.

(1) 8 App. Cas. 494. (2) 15 Q. B. 689.

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1886
JUSTICES OF THE PEACE FOR COUNTY OF LANCASTER v. IMPROVEMENT COMMISSIONERS OF NEWTON IN MAKERFIELD.
Lord Herschell, L.C.

In the year 1855 a portion of a turnpike road running from Warrington to Wigan was included within the improvement district of Newton. Thereupon that portion of the road became vested in the improvement commissioners and came under their management, and the turnpike trustees by reason of sect. 50 of the Towns Improvement Act no longer had power to maintain it and ceased to do so. Sect. 51 of the Towns Improvement Act gives to the commissioners large powers of managing and altering the roads within their jurisdiction. In 1877 the turnpike trust came to an end. The question is whether the portion of the road within the improvement district ceased to be a turnpike road subsequent to the 31st of December 1870 within the meaning of the Highway Act 1878.

For the appellants it was contended that it ceased to be a turnpike road prior to that date. The respondents insisted that it continued to be part of the turnpike road until the expiration of the trust in 1877.

Two cases have recently been before your Lordships' House, in which the facts were very similar to the present, and in which it became necessary to put a construction upon the 13th section of the Highways Act 1878. These cases require careful examination. The first in order of date was *Justices of Lancashire* v. *Mayor of Rochdale* (1). There portions of certain turnpike roads were included in 1853 in a district subject to the Towns Improvement Act of 1847. In 1856 the powers theretofore exercised by the commissioners were transferred to the town council of the borough, and by an extension of the boundaries of the borough other portions of the same roads, with regard to which the question in the action arose, were brought within the area of the borough.

After the passing of the Highways Act 1878 it was contended on behalf of the corporation of Rochdale that these parts of the roads had ceased to be turnpike roads since 1870 within sect. 13 of that Act, and that consequently they had become main roads, one half of the cost of repair of which must fall upon the county. This view was contested on the part of the county, and ultimately it was decided by this House, reversing the judgment of the

(1) 8 App. Cas. 494.

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Court of Appeal, that the county were not liable. The main ground of this decision appears to have been that sect. 13 of the Act of 1878 only applied where the entire road which had been subject to the turnpike trust ceased to be so, and that it did not apply to a portion of a turnpike road, even if that portion might in some sense be said to have ceased to be a part of the turnpike road. The question in the Rochdale case arose with reference to portions of five turnpike roads, created under different Acts. The trusts expired in the case of one of these roads after the commencement of the action, the writ in which bore date the 13th of November 1880. In the case of one road the trust expired on the 1st of November 1879, and in the case of two others on the 1st of November 1880. But, inasmuch as the sum sought to be recovered in the action was one-half of the expenses incurred for the half-year ending the 31st of March 1879, these cases were obviously all governed by the same considerations. The trust in the case of one road, however, the Halifax Road, had expired as far back as 1872. And the facts relating to this road appear to be precisely parallel to the facts in the present case. The question asked in the special case stated in the case of *Justices of Lancashire* v. *Mayor of Rochdale* (1) was, whether the county authority were liable to pay to the corporation the sums demanded, "or any part thereof." It was competent, therefore, for the tribunals in that case to deal separately with the sum relating to the Halifax Road, and to give the plaintiffs judgment for that sum, whilst absolving the defendants from liability in other respects. The Queen's Bench gave judgment generally for the defendants, and their judgment was affirmed by your Lordships' House.

If I could find that the learned Lords who gave their opinions on that occasion had present to their minds the distinction between the Halifax Road and the other roads, I should have felt that the case now before us was concluded in favour of the appellants by the decision in the Rochdale case. But it seems to me clear that the distinction in favour of the plaintiffs in the Rochdale case, so far as the Halifax Road was concerned, was not adverted to or considered by any of your Lordships who took

(1) 8 App. Cas. 494.

part in that decision, and there is no reference to it in the then respondents' case. Lord Blackburn, indeed, refers incidentally in his statement of the case to the fact that the trusts of some of the roads had expired, and that some had not expired at the time when the action was brought. But this, of course, was immaterial unless the trust had expired prior to the half-year in respect of which the claim was made, and the learned Lord grounds no argument upon it. Lord Bramwell in his judgment, after enunciating his construction of the Act of 1878 adds, "How is it conceivable that the legislature could have intended that at the expiration of six years this burthen which the corporation of Rochdale had voluntarily taken upon themselves should be taken from them and shifted in part upon the county?" And he further pointed out that the Rochdale corporation had power to deal with these roads in a very different manner from that in which a road is commonly dealt with by a parish which has to repair it after it ceases to be a turnpike road. Lord FitzGerald, too, strongly enforces these considerations. But I think they were urged by both these learned Lords in support of the construction they were putting upon sect. 13, that "road" as used in that section does not include a part of a road, but means in the language of Lord Bramwell "the entirety of the road which has been a turnpike road." They neither of them address any observations to the construction which must be put upon the enactment if, when the entire turnpike trust expired after December 1870, those portions of the road which prior to that date had become included within the area of boroughs were not to be treated as part of the road which, on the expiration of the trust ceased to be a turnpike road, and therefore was to become a main road.

I turn now to a consideration of the other case to which I have alluded, viz., *Justices of the West Riding* v. *Reg.* (1) The question in that case was, as in the present, whether portions of certain turnpike roads had ceased to be turnpike roads subsequent to the 31st of December 1870. The turnpike trust had, in the case of one of those roads, expired in 1876. But prior to 1870 the part of the road in question was within the borough and

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within the town of Sheffield. By the terms of the Turnpike Act the trustees were forbidden to spend any money in repairing any street, highway, or place in any part of that town, or to collect any toll there. Under these circumstances, it was contended that this portion of the road had been disturnpiked prior to 1870, and that consequently, on the expiry of the turnpike trust in 1876, it did not form part of the turnpike road which then became a main road. Taking these to be the facts, Lord Blackburn held that nothing had happened to prevent this part of the road from being still a part of the turnpike road, or to afford an argument for saying that it was not to be a part of the main road on the expiry of the trust, though an argument was, he thought, afforded in favour of saying that it was no longer under the turnpike trust. Lord Watson entirely concurred in this judgment.

Having regard to the reasoning upon which the judgment in the Sheffield case proceeded, I think it is hardly possible to distinguish that case in substance from the one now under consideration. And taking the Rochdale and Sheffield cases together they appear to me to conclude the present case against the appellants. The former of those cases decided that in the 13th section of the Highways Act 1878 the words "any road" refer to the entire road which had been subject to the turnpike trust, and not to a part of it. The latter case determined that a portion of a turnpike road which has during the currency of the term for which the trust was created become part of a street within a borough, and no longer repairable by the turnpike trustees, nevertheless remains so far a part of the turnpike road as to become part of the main road when the trust expires within the time specified in the 13th section.

It is not necessary to say what my opinion would have been had the matter been res integra. I quite feel the force of the observations made by Lord Bramwell in the Rochdale case, that it was not probable that the legislature intended to relieve the corporation of part of the expense of repairing one of the streets in the town, and to throw that burthen on the county; but I think the force of those observations is much weakened by the fact, which was pointed out by Mr. Glen in the course of his argument, that part of the burthen of repairing all the other

main roads in the county is by the same enactment thrown upon the borough.

I move your Lordships that the judgment appealed against be affirmed, and the appeal dismissed, with costs.

LORD WATSON:—

My Lords, I concur in the judgment proposed, which appears to me to be a necessary consequence of the construction of sect. 13 of the Highways Act 1878 which was adopted by this House in the case of *Justices of the West Riding of Yorkshire* v. *Reg.* (1)

LORD FITZGERALD:—

My Lords, I also concur, and think that this case is governed by the Sheffield case.

LORD ASHBOURNE:—

My Lords, I have had an opportunity of reading the opinion of the noble and learned Lord on the woolsack, and I entirely concur in the conclusion at which he has arrived, and in the reasons which he has given for it.

Judgment appealed from affirmed, and appeal dismissed with costs.

Lords' Journals 30th July 1886.

Solicitors for appellants: *Ridsdale & Son for Wilson & Hulton, Preston.*

Solicitors for respondents: *Field, Roscoe, Field, Francis & Osbaldeston, for J. E. Worsley, Warrington.*

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[HOUSE OF LORDS.]

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THE COLONIAL BANK . . . . . APPELLANTS;

AND

FREDERICK WHINNEY . . . . . RESPONDENT.

Bankruptcy—Reputed Ownership—Order and Disposition of Bankrupt "in his trade or business"—Shares in Incorporated Company—Deposit of Share Certificates—Equitable Mortgage of Shares—Transfer of Shares—Chose in Action—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52) *s.* 44 *sub-s. iii.*

Shares in an incorporated company transferable only by deed are "things in action" within the meaning of the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) s. 44 sub-s. iii.

A registered shareholder in an incorporated company deposited with his bank his share certificates, together with a blank transfer executed by himself as security for advances by the bank. Upon each certificate was a note that in the event of sale or transmission the certificate must be surrendered with the deed of transfer before the transfer could be registered or a new certificate issued. The Companies Clauses Consolidation (Scotland) Act 1845 (8 & 9 Vict. c. 17) to the provisions of which this company was subject, by s. 12 enacts that the certificate shall be primâ facie evidence of title, but that the want of the certificate shall not prevent the holder of any share from disposing thereof; and by s. 14 requires the transfer of any share to be by deed.

The shareholder having become bankrupt before the company received any notice of the deposit:—

Held, reversing the decision of the Court of Appeal (30 Ch. D. 261), that having regard to the note upon the certificates, the shares were not in the possession, order, or disposition of the shareholder under such circumstances that he was the reputed owner thereof within the meaning of the Bankruptcy Act 1883 s. 44 sub-s. iii.:

Held, also, reversing the decision of the Court of Appeal, that the shares were "things in action" within the meaning of the proviso in that subsection.

APPEAL from an order of the Court of Appeal (1). The facts material to this report are as follows:—

W. E. Blakeway and P. W. Thomas carried on business as stockbrokers in London under the firm of P. W. Thomas, Sons, & Co. In January 1880 the firm bought 7018 £10 shares in the

(1) 30 Ch. D. 261.

Forth Bridge Railway Company, which were registered in the name of W. E. Blakeway and held by him for the firm. The Forth Bridge Railway Company was incorporated by a special Act of 1873, which incorporated the Companies Clauses Consolidation (Scotland) Act 1845 (8 & 9 Vict. c. 17). Each share certificate contained the following :—"Note.—In the event of sale or transmission this certificate must be surrendered with the deed of transfer, whether the deed transmits all or any of the shares, before the transfer can be registered or a new certificate issued." In April 1880 Blakeway deposited with the appellants the certificates for his 7018 shares, together with a blank transfer executed by himself, as security for a balance due from the firm to the appellants. In January 1884 Blakeway & Thomas became bankrupt, and the respondent was appointed trustee in bankruptcy. No notice of the deposit was given to the railway company till after the bankruptcy. The terms of partnership and the mode in which the firm carried on their business are stated in the report of the decision below (1). They are omitted here as irrelevant, this House giving no opinion upon the meaning of the words "in his trade or business" in the Bankruptcy Act 1883 s. 44 sub-s. iii. (2).

The appellants having brought an action against the respondent claiming a declaration that they were entitled to a valid charge on the shares for the balance due with interest, and to have the shares transferred into their names, and for consequential relief, Bacon V.C. dismissed the action with costs, and this decision was affirmed by the Court of Appeal (Cotton and Lindley L.JJ., Fry L.J. dissenting).

From this order the plaintiffs appealed.

(1) 30 Ch. D. 261.

(2) Sect. 44: "The property of the bankrupt divisible amongst his creditors and in this Act referred to as the property of the bankrupt shall . . . comprise the following particulars :—

(iii.) All goods being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section."

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May 21, 24, 28, 31, June 1, 4. *Rigby* Q.C. and Sir *R. Webster* Q.C. (*Northmore Lawrence*, with them) for the appellants:—

The decision of the Court of Appeal is wrong on several grounds: first, because the shares were not at the commencement of the bankruptcy "in the possession, order, or disposition of the bankrupt" under such circumstances that the bankrupt was "the reputed owner thereof"; secondly, because they were not in the bankrupt's possession, &c., "in his trade or business"; and thirdly, because the shares are "things in action" within the meaning of the proviso in the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) s. 44 sub-s. iii. First, the shares were not in the possession, &c., of Blakeway or of his firm under such circumstances that he was the reputed owner. The only fact which could raise a presumption of apparent or reputed ownership was the registration of Blakeway in Scotland as the owner. But he had parted with the possession of the certificates; and this disposes of the question of order and disposition and reputed ownership. The Companies Clauses Consolidation (Scotland) Act 1845 (8 & 9 Vict. c. 17) ss. 11, 12, 13, 16, 21, contain express enactments as to the certificates, but do not prevent a company making protective stipulations as to not transferring without their production, as is the practice with most companies. The stipulation made by the note on the certificates as to non-transfer without production was part of the bargain between Blakeway and the appellants, and was binding on the company, so that no transfer could take place without the production of the certificates: see *Société Générale de Paris* v. *Walker* (1), and especially the judgment of Lord Selborne.

This question as to certificates arose first in two cases which are strong authorities in favour of the appellants, viz., *Ex parte Harrison* (1838) (2), and *Ex parte Richardson* (1839) (3). See also *Morris* v. *Cannan* (1862) (4). A custom not to acknowledge a title to property unless accompanied by the indicia of title takes the case out of the order and disposition clause: *Ex parte Devonport* (5), see also *Great Eastern Railway Company* v. *Turner* (6).

(1) Ante, p. 20.
(2) 3 Deac. 185, 200.
(3) Mont. & Ch. 43.
(4) 4 D. F. & J. 581; 31 L. J. (Ch.) 425; 8 Jur. (N.S.) 653.
(5) 1 Deac. & Ch. 397.
(6) Law Rep. 8 Ch. 149.

As to the second point; the order and disposition clauses of the former Bankruptcy Acts did not contain the words "in his trade or business;" see 21 Jac. 1 c. 19 ss. 10, 11; 6 Geo. 4 c. 16 s. 72; 12 & 13 Vict. c. 106 s. 125; and 32 & 33 Vict. c. 71 s. 15, where the words "being a trader" were introduced. Under the Bankruptcy Act 1883 (46 & 47 Vict. c. 52) s. 44, the possession, order, or disposition (whichever it be) of the bankrupt must be "in (not "for the purposes of") his trade or business:" that is the fundamental fact: *In re Jenkinson* (1). The intention of the Act was to revert to the state of things before *Ryall* v. *Rolle* (1747–50) (2). Here the order and disposition in no way touched the business. How the things came into the bankrupt's possession, order and disposition is immaterial; e.g., if he had bought them with the proceeds of his business, or if the things appeared in his annual balance sheet. An inquiry into such matters would be irrelevant. The only question under the Act is, whether there is the external appearance of—not ownership—but possession, order, or disposition in his business. What is hidden is nothing; the only question is, what is seen. Here the only thing seen was the registration. But further, the possession, order, or disposition must here be shewn to be that of the firm: for the only business carried on was that of the firm, the partners being precluded from carrying on any individual business. The doctrine of reputed ownership under the old law is set forth in 2 Lindley on Partnership, 3rd ed. pp. 1183, 1193; and illustrated by *Ex parte Arbouin* (3); see also *Ex parte Dorman* (4).

Thirdly, the shares are "things in action" within the meaning of the proviso. There is only one authority against this view: *Ex parte Union Bank of Manchester* (5). "Things in action" are things to get possession of which an action must be brought; see Brooke's New Cases of the time of Hen. 8, Edw. 6, and Queen Mary, written out of the Great Abridgement (ed. 1675) pl. 211; (ed. 1651) p. 50; upon 31 Hen. 8, c. 19 speaking of "things in action real;" Termes de la Ley, ed. 1708, p. 121. The right of presentation to a living is a chose in action: Co. Litt. 90 a; see

(1) 15 Q. B. D. 441.
(2) 1 Atk. 165; 1 Ves. Sen. 348; 2 Tu. L. C. Eq. 6th ed. p. 799.
(3) De G. 359.
(4) Law Rep. 8 Ch. 51.
(5) Law Rep. 12 Eq. 354, 357.

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also Co. Litt. 212 a, 351 a: *Ryall* v. *Rolle* (1), per Lord Hardwicke; 1 Shepp. Touch. ed. 1820, pp. 97, 98; 2 Bl. Com. c. 25, p. 396 (21st ed.). "Things in action" include a policy of assurance: *Ex parte Ibbetson* (2); dividends on bank stock: *M'Carthy* v. *Goold* (3); shares in a joint stock company: *Humble* v. *Mitchell* (4); a share in an ascertained fund: *Honner* v. *Morton* (5); in stock: *Curtis* v. *Sheffield* (6); *Rex* v. *Capper* (7); see also *Ex parte Boulton* (8); *Ex parte Agra Bank* (9); *Ex parte Bank of England* (10).

Debentures and debenture stock are clearly choses in action. Debentures in a joint stock company have been held to be choses in action: *Ex parte Rensburg* (11). Debentures can be turned into transferable debenture stock; see the Companies Clauses Act 1863 (26 & 27 Vict. c. 118) s. 22–28. In debenture stock and shares alike the principal is not repayable, and the interest is payable out of the company's earnings. What difference can there be in principle between debentures, debenture stock, and shares?

A partner's share in a partnership is a chose in action: *Ex parte Bainbridge* (12). How can it cease to be a chose in action when the partnership is incorporated?

The Judicature Act 1873 (36 & 37 Vict. c. 66) s. 25 sub-s. 6 speaks of "all debts and other legal choses in action." There is nothing in the Bankruptcy Act 1883 to prevent "things in action" being taken in the wide sense in which that term has been generally understood.

Sir *Horace Davey* S.G. and *A. G. Marten* Q.C. (*H. B. Buckley*, with them) for the respondent:—

Blakeway being the registered owner was and was held out to the world as the owner of the shares, and the only person entitled to the dividends. As between him and every one else the shares

(1) 2 Tu. L. C. Eq. 6th ed. p. 831.
(2) 8 Ch. D. 519.
(3) 1 Ball & Beat. 387, 389.
(4) 11 A. & E. 205, 208.
(5) 3 Russ. 65, 68, 72.
(6) 8 Sim. 176.
(7) 5 Price, 217.
(8) 1 D. & J. 163.
(9) Law Rep. 3 Ch. 555, 558; 18 L. T. (N.S) 154, 866.
(10) Law Rep. 2 Ch. 662, 667.
(11) 4 Ch. D. 685.
(12) 8 Ch. D. 218.

were in his "possession" as well as in his "order" and his "disposition" with the consent of the true owners, the appellants. The parting with the certificates to the equitable mortgagees —even with that note upon the certificates—did not take them out of his possession, or order, or disposition. To decide the other way would be to disregard a long series of cases: see for example *Ex parte Ord* (1), and *Ex parte Vallance* (2). To complete the equitable title of the mortgagee and take the shares out of the reputed ownership clause there must be notice to the company: *Ex parte Richardson* (3); *Ex parte Agra Bank* (4), per Lord Hatherley; *Ex parte Boulton* (5), per Turner, L.J.; *Ex parte Stewart* (6); *Morris* v. *Cannan* (7); *Ex parte Littledale* (8); *In re Grehan* (9); *Ex parte Wood* (10).

Sects. 9 & 29 of the Companies Clauses Consolidation (Scotland) Act 1845 (8 & 9 Vict. c. 17) require registration, and make registration primâ facie evidence of ownership. The transfer clauses make the production of the certificates unnecessary for a transfer: see per Lord Cairns in *Shropshire Union Railways and Canal Company* v. *The Queen* (11). Blakeway could have required the company to register a transfer from himself without producing or accounting for the certificates. This is the meaning and effect of s. 12 of the Companies Clauses Consolidation (Scotland) Act 1845: "The said certificate shall be admitted in all Courts as primâ facie evidence of the title of such shareholder, his executors, administrators, successors or assigns to the share therein specified; nevertheless the want of such certificate shall not prevent the holder of any share from disposing thereof." No memorandum upon the certificate, no bargain between the company and its own shareholder could supersede this express enactment. The company not being bound to see to the execution of any trust, express, implied, or constructive (s. 21), nothing but a properly executed transfer could take the shares out of the possession, order, or disposition of Blakeway. In the *Société*

(1) 1 Deac. 166.
(2) 2 Deac. 354.
(3) Mont. & Ch. 43.
(4) Law Rep. 3 Ch. 555.
(5) 1 D. & J. 163.
(6) 4 D. J. & S. 543; 34 L. J. (Bkcy.) 6.
(7) 4 D. F. & J. 581.
(8) 6 D. M. & G. 714.
(9) L. R. Ir. 1 Eq. 84.
(10) 3 Mont. Deac. & D. 315, 317.
(11) Law Rep. 7 H. L. 496, 509.

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Générale de Paris v. *Walker* (1) no question arose as to order and disposition or reputed ownership. Passages from Lord Selborne's judgment as to the effect of the note on the certificate are relied upon by the appellants, but Lord Blackburn abstained from expressing any opinion on that point, and it certainly was not decided by the House.

[LORD BLACKBURN referred to *Hamilton* v. *Bell* (2)].

Further, the shares were as a matter of fact in the possession, order or disposition of Blakeway as part of his stock in trade, that is, in his trade or business. The business was none the less that of one partner because there was another partner. The circumstances were such that every one would suppose Blakeway to be the owner; and he was therefore the reputed owner within the statute. The registered owner is the reputed owner.

Shares are not things in action. Shares have been likened to debenture stock, but a debenture stockholder is not like a shareholder: he is not a partner in the adventure, has no right of voting, &c. The decision of Bacon V.-C. in *Ex parte Union Bank of Manchester* (3) has never been questioned. A thing in action is that which is recoverable only by action, e.g., debts and policies of assurance. Shares are not debts, and are not recoverable by action. Sect. 50 of the Bankruptcy Act 1883 shews that in this Act at least shares are contrasted with things in action; see sub-ss. 3 and 5.

Sir *R. Webster* Q.C. replied, and upon the question of transfer without production of the certificates referred to *Simm* v. *Anglo-American Telegraph Company* (4); Yate Lee and Wace's Bankruptcy, pp. 385, 386 (2nd ed.).

The House took time for consideration.

June 29. LORD BLACKBURN:—

My Lords, this is an appeal against an order of the Court of Appeal affirming a judgment of Bacon V.-C. dated the 28th of

(1) Ante, p. 20.
(2) 10 Ex. 545.
(3) Law Rep. 12 Eq. 354, 357.
(4) 5 Q. B. D. 188.

July 1884, and ordering that the plaintiffs, the Colonial Bank, do pay the costs.

The judgment of the 28th of July, so far as it is material, was as follows:—"This Court, being of opinion that the plaintiffs are not entitled to the relief prayed by the statement of claim in this action, doth order that the action stand dismissed out of this Court, with costs to be paid by the plaintiffs."

The facts are not in dispute, and as far as material, in the view I take of the case, may be briefly stated. The firm of P. W. Thomas, Sons, & Co. consisted of two persons, W. E. Blakeway and Percy William Thomas. The firm bought and paid for 7018 £10 shares in the Forth Bridge Railway, a company incorporated by an Act of Parliament incorporating the Companies Clauses Consolidation (Scotland) Act, 8 Vict. c. 17. The name of W. E. Blakeway was entered in the register of shareholders as entitled to the 7018 shares, and certificates were delivered in his name, but the shares belonged to the firm.

The certificates of the shares (as to the form and legal effect of which I will say a word a little later) were deposited with the Colonial Bank as a security for advances made to the firm by that bank. They were accompanied by what is commonly called a blank transfer, signed and sealed by W. E. Blakeway. That was inoperative as a transfer. It was however, I think, evidence that the deposit of the certificates was intended to be as a security. There was ample evidence independent of this to shew that this was the real nature of the transaction, and that so long as the firm continued sui juris the Colonial Bank had a right to detain these certificates till the advances for which they were pledged were paid off; and it is not disputed now that, whilst the pledgors remained sui juris, the pledgee would be entitled to the relief which the Colonial Bank have prayed by the statement of claim in this action against the defendant. Some doubt which might seem to be thrown on this by *Ex parte Boulton* (1) was removed by the decision in *Ex parte Stewart* (2). But though this was so, the firm were still entitled to what, for want of a better term, I may (not quite accurately) call the equity of redemption in the shares. It was not contested that, as it has

(1) 1 D. & J. 163. (2) 4 D. J. & S. 543.

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turned out, the value of the shares was not sufficient to meet the unpaid advances, so that this property remaining in the firm has turned out not to be of any value; still it was their property.

Both partners became bankrupt in January 1884, and the defendant was on the 18th of February 1884 appointed trustee under the bankruptcy.

Lord Westbury in *Ex parte Stewart* (1) points out that the general rule in bankruptcy was that the assignee took the property of a bankrupt subject to the equities which affected it in his hands, and consequently that the only question under the bankruptcy law then in force, 12 & 13 Vict. c. 106, was whether the case was brought within 12 & 13 Vict. c. 106 s. 125.

The only question in the present case is whether the case is brought within sub-sect. iii. of sect. 44 of the Bankruptcy Act, 1883, which comprises, amongst the property of the bankrupt divisible among his creditors, "all goods" (a word which by the interpretation clause, sect. 168, in this Act, "unless the context otherwise requires," includes "all chattels personal") "being at the commencement of the bankruptcy in the possession, order, or disposition of the bankrupt in his trade or business, by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof; provided that things in action, other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section."

There can, I think, be no doubt that shares in a railway company, though not goods in the ordinary sense of the word, are personal chattels, and I think as little doubt that the Colonial Bank were the true owners of the equitable right which they had acquired in the shares; but for the proviso, therefore, I think the chief question would have been whether this equitable interest was in the possession, order, or disposition of the bankrupts, who were the pledgors and true owners of the equity of redemption, by the consent and permission of the Colonial Bank under such circumstances that they, the bankrupts, were the reputed owners of the equitable interest. A further point was made, founded on the words "in his trade or business." I fear I did not quite

(1) 4 D. J. & S. 543.

appreciate the argument, and as the words, which are new, may be important in other cases, I prefer to consider the case as if those words were not here.

I think that the owner of chattels personal not passing by delivery, though he can create a good equitable title in a pledgee for the purpose of securing a debt, may still continue to be reputed owner of the whole property. It was argued that there was an inexorable rule that he must so continue, unless the persons to whom anyone who took a subsequent conveyance from the person once the owner of the property would have to apply in order to perfect that title, had knowledge of the pledge. I think that such knowledge in them is one way in which it may be shewn that the pledgor is not to be considered as reputed owner. If the decisions were confined to cases of notice, that is, notice given to those persons by the pledgee, as distinguished from mere knowledge acquired by them otherwise, it might be said that the cases only shewed that the pledgee having given that notice, and done all that was in his power to make the pledge known, could not be said to *consent* to the apparent ownership. But *Ex parte Richardson* (1), *Ex parte Stewart* (2), and *Ex parte Agra Bank* (3), all shew that knowledge in those persons, though not derived from the pledgee, is a sufficient circumstance to prevent reputed ownership; I do not think there is either authority or principle for saying it is the only circumstance that can have that effect.

Lord Hardwicke, who thought that the statute only applied where the bankrupt had been originally owner, says, in *Ryall* v. *Rolle* (4), "It appears that the general view and intent of the provision now under consideration was to prevent traders from gaining a delusive credit, by a false appearance of substance to mislead those who should deal with them."

In *Cole* v. *North Western Bank* (5), in the judgment of the Exchequer Chamber, it is said, "At common law, a person in possession of goods could not confer on another, either by sale or pledge, any better title to the goods than he had himself. To

(1) Mont. & Ch. 43.
(2) 4 D. J. & S. 543.
(3) Law Rep. 3 Ch. 555.
(4) 1 Ves. Sen. 348, 371.
(5) Law Rep. 10 C. P. 354, 362.

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this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shewn that the seller or pledgor had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledgor with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced bonâ fide to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited."

The policy of the Bankrupt Act, as explained by Lord Hardwicke, went a good deal further. It took, in the event of bankruptcy, the property of the person who had left it in the hands of the trader to pay the general creditors of the bankrupt, though no credit had actually been obtained upon it; but I think it never was so unjust as to take his property, unless it was left by him in such circumstances as that credit might have been obtained upon it. This principle seems to have been lost sight of in some cases. I think, however, it was fully recognised and restored in *Ex parte Watkins* (1). That was as to the claim of one who had bought and paid for wine, but left it in the custody of the vendor, who afterwards became bankrupt—as to goods, not as to chattels such as shares. But the principles explained by Lord Selborne are, I think, equally applicable to both. He says: "There is no inflexible rule of law that, because a man who was once the owner of goods and has sold them remains in possession of them, he must therefore be held to be the reputed owner. The statute does not say that. If he remains in possession with the reputation of ownership, and in those circumstances which create a reputation of ownership, then the property will pass to his assignees; but it is always a question of fact whether or no the circumstances are such as to create that reputation. . . . It is enough for the doctrine if those goods are in such a situation as

(1) Law Rep. 8 Ch. 520, 528.

to convey to the minds of those who know their situation, the reputation of ownership, that reputation arising by the legitimate exercise of reason and judgment on the knowledge of those facts which are capable of being generally known to those who choose to make inquiry on the subject. . . . So, on the other hand, it is not at all necessary, in order to exclude the doctrine of reputed ownership, to shew that every creditor, or any particular creditor, or the outside world who are not creditors, knew anything whatever about particular goods one way or the other. It is quite enough, in my judgment, if the situation of the goods was such as to exclude all legitimate ground from which those who knew anything about that situation could infer the ownership to be in the person having actual possession."

Mellish L.J. says: "Reputed owners of the goods so left in their possession surely must mean reputed to be the owners by the persons who have dealings with them, and who might be deceived." And he adds: "I must also say I think it extremely desirable that, as far as can be done reasonably and consistently with the rules of law, the law should be so interpreted as to be in accordance with the customs of trade."

I now return to the form of the certificates in this case, which contain in them this note:—"Note, in the event of sale or transmission this certificate must be surrendered with the deed of transfer, whether the deed transmits all or any of the shares, before the transfer can be registered, or a new certificate issued." I may deal with this more briefly, because a very analogous case, *Société Générale de Paris* v. *Walker* (1), has recently been decided in this House, and I see no reason to alter any part of what I then said. It was argued in the present case that a person remaining on the register and executing a transfer, or the transferee from such a person, would have a right to bring an action against the company who acted upon this note, and declined to register the transfer until the certificate was produced. I do not think so; if the company declined to do so after the non-production of the certificate was accounted for, as by proof that it was lost or destroyed, or that it was wrongfully withheld by someone who had no right to withhold it, I suppose a Court

(1) Ante, p. 20.

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would, on proof of those facts, order registration; probably requiring as a condition that an indemnity should be given; but I continue to think that it is not wrong in the directors to act in the way which by this note they hold forth that they will act, and I think it at least doubtful whether, if they hastily and without inquiry registered the transfer, they might not incur responsibility to a pledgee who had the certificates with that note upon them if he suffered loss from their so acting. And the custom of trade, at least as far as regards the Stock Exchange, has always been that before the buyer of shares pays his money he is entitled to have delivered to him a transfer accompanied by certificates shewing that the person who executes the transfer was the registered holder of the shares.

I think, therefore, it is clear that any one who was about to give credit to the bankrupts as being the owners of the entire interest in those shares ought to know that he had no legitimate ground for believing that they were such owners of the whole interest, unless the certificates were produced or accounted for. And any inquiry as to what had become of the certificates would (unless the bankrupts were fraudulent liars, which we have no right to assume) have led to the disclosure of the fact that they were pledged. I think, therefore, it is proved that the circumstances were such as to prove that the bankrupts were not reputed owners of the interest of the Colonial Bank in the shares, and that the order appealed against is wrong on that ground. The judges below had not in the case of the *Société Générale de Paris* v. *Walker* (1) perceived the importance of the production of the certificates, and they decided this case before this House had given their judgment on appeal in that case. They did not, therefore, notice this point.

On the construction of the proviso, I think that Fry L.J. put the right construction on the proviso. The question, I think, is correctly said to be whether the expression "things in action" as used in this enactment, is intended to include shares in a railway company, which clearly are personal chattels, the property in which does not pass by mere delivery, but does pass by a deed of transfer duly stamped (8 & 9 Vict. c. 17 ss. 14 and 16) when

(1) Ante, p. 20.

delivered to the secretary and by him entered in the registry: "And until such transfer has been so delivered to the secretary as aforesaid the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking or to vote in respect of such share."

The principal argument used by the counsel for the respondent, and it seems to have prevailed both with Cotton L.J. and Lindley L.J., was that "choses in action," of which things in action is a translation, had a technical sense in our old law limited to the right to sue for a debt or damages. I do not think that made out. There always was a difference between personal property, such as to be capable of being stolen, taken, and carried away, and so to be the subject of larceny at common law, and to be capable of being seized by the sheriff under a fi. fa., and other kinds of personal property. Personal property of the first sort, when belonging to a married woman, vested at once in the husband. The others the husband might reduce into possession, but did not have till he had done so. And when new kinds of property, like stock in the funds, or in more modern times shares in companies, were created, questions arose as to whether they were within the principle of being in possession or not; but till the phrase was used in the Act of 1869 it never became important to inquire whether they were to be called things in action or not. But it is noticeable that, in *Dundas* v. *Dutens* (1), Lord Thurlow, speaking of stock or the funds, said: "Those things, such as stock, debts, &c., being choses in action are not liable. They could not be taken upon a levari facias." The reason was the same as that for which they could not be the subject of larceny at common law, because they could not be seized. But Lord Thurlow thought choses in action an apt expression to use with respect to such things. Again, shares are not within the 17th section of the Statute of Frauds, because they do not pass by delivery; Lord Denman, in *Humble* v. *Mitchell* (2), thought choses in action a proper phrase to express that idea. Again, in *Ex parte Agra Bank* (3), Wood L.J. in

(1) 2 Ves. Jun. 196. (2) 11 A. & E. 205. (3) Law Rep. 3 Ch. 555, 560.

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speaking of an assignment of shares, uses the phrase "whether in an assignment of a chose in action." He had no need to inquire whether it was a strictly correct phrase, but to him it appeared, as it had done before to Lord Thurlow and Lord Denman, that the phrase expressed the idea. And I think it was hardly disputed that, in modern times, lawyers have accurately or inaccurately used the phrase "choses in action" as including all personal chattels that are not in possession. In what sense, then, is it used in the 15th section of the Act of 1869 from which the present enactment is taken? It is not disputed that these words shew that the legislature intended to take policies of insurance out of the order and disposition clause. Why not shares in companies also? I cannot answer that question in any way satisfactory to my mind.

For this reason also, I think that the judgment is wrong, and that the judgment of the Vice-Chancellor ought to have been that the plaintiffs are entitled to the relief prayed by the statement of claim.

I, therefore, propose that the judgment appealed against and the judgment of the 28th of July 1884 therein affirmed be reversed; and that the costs of the appellants in this House and in the Court of Appeal be borne by the respondent.

LORD WATSON:—

My Lords, I also am of opinion that the judgments appealed from ought to be reversed.

The principle which appears to me to be deducible from the authorities, is this: that goods belonging to a third party are not within sect. 44 (iii.) of the Bankruptcy Act 1883, unless they were left with the bankrupt in such circumstances that, as reputed owner, he could have sold them, or otherwise obtained credit upon them, in the course of his trade or business.

I do not think the 7018 shares in the Forth Bridge Railway Company were left in that position at the commencement of the bankruptcy of the firm of P. W. Thomas, Sons, & Co., and its individual partners. The appellants had at that time become the equitable owners of the shares, and were lawful holders of the certificates issued by the railway company, which bore upon the

face of them an intimation that "in the event of sale or transmission this certificate must be surrendered with the deed of transfer, whether the deed transmits all or any of the shares, before the transfer can be registered or a new certificate issued." That is, in my opinion, an assurance by the company, upon which a lawful holder of the certificates is entitled to rely, to the effect that, according to their usual practice, the company will decline to register any transfer of shares until the relative certificates are produced, or their non-production is satisfactorily accounted for.

The case of *Société Générale de Paris* v. *Walker* (1) as decided by this House, is, in my opinion, a clear authority for holding that a transfer of these 7018 shares by William Evan Blakeway, after the certificates were deposited with the appellants, would not have been "in order." In other words, the transfer would not have been registered until some inquiry was made, and some evidence submitted to the railway company, shewing that the certificates had been lost or destroyed. A truthful explanation would at once have revealed the equitable ownership of the appellants; so that the transfer could not have been made effectual, unless Mr. Blakeway had chosen to commit a new fraud, and possibly perjury as well. In that state of matters, I do not think Mr. Blakeway can be held to have been in a position to make an effectual sale of the shares in question, or to obtain credit upon them from any prudent customer. I cannot, therefore, hold that the shares were in his order and disposition in such circumstances that he was the reputed owner thereof.

I have had considerable difficulty in making up my mind upon the other question of importance raised in this appeal. But, on consideration, I have come to be of opinion, with your Lordships, that such shares as these are "things in action" within the meaning of the proviso in sect. 44 (iii.) of the Bankruptcy Act 1883.

LORD FITZGERALD:—

My Lords, the two questions necessarily involved in this appeal are so important commercially and in relation to advances of money on the security of shares in public companies, that I feel

(1) Ante, p. 20.

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called on to express my reasons for concurring in opinion with my noble and learned friends.

These questions arise on the concluding sub-section of the 44th section of the Act of 1883, which now represents the order and disposition clause in bankruptcy, and it may be expedient to glance for a moment at the early history of the provision in the bankrupt law in this respect.

A somewhat ancient writer tells us that "although originally merchants were much favoured in our law, yet soon their number and cunning and their crafty dealings had so much increased that it fell out we had more need to make laws against them." Whether this is accurate or not in the present day, I do not know. We find in the earlier statutes bankrupt traders are dealt with very much as if criminals. The 34 & 35 Henry 8 c. 4 was enacted "*against*" such persons "*as do make bankrupts.*" The 13 Eliz. c. 7, in dealing with who is a bankrupt, and how and by whom his *body*, lands and goods shall be ordered for payment of the creditors, recites that "Those kind of persons do still increase and are like more to do if some better provision be not made for their repression." We find in the preamble of 1 James 1 c. 15: "For that frauds daily increase amongst such as live by buying and selling, by such as wickedly and wilfully become bankrupts." We next come to the 21 James 1 c. 19 which is, inter alia, "for inflicting corporal punishment on bankrupts" in some defined cases. That statute contained, in its 11th section, the first enactment on the subject of reputed ownership and extended to goods left in the possession, order and disposition of the bankrupt with the consent of the true owner. It seems to have been intended by this section to repress dealings of third parties with traders which were in their nature fraudulent, or were at least calculated to defraud creditors by obtaining for the trader credit on false and delusive appearances. The 11th section does not appear to have been put into actual operation for a long period after its enactment. It had almost become obsolete, and was first really expounded by Lord Hardwicke more than a century afterwards. It was on the 11th section of that statute that he decided *Ryall* v. *Rolle* (1), and the case of *Joy* v. *Campbell* (2) arose before Lord

(1) 1 Ves. Sen. 348. (2) 1 Sch. & Lef. 328.

Redesdale in 1804 on similar words in the Irish Bankrupt Act, the 11 & 12 Geo. 3 c. 8 s. 9.

In the latter case Lord Redesdale observed: "Now that clause refers to chattels in possession of the bankrupt"—in his order and disposition with consent of the true owner—"that means where the possession, order, and disposition is in a person who is not the owner, to whom they do not properly belong, and who ought not to have them, but whom the owner permits, *unconscientiously* as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader from the *visible* possession of a property to which he was not entitled; but in the construction of the Act, the nature of the possession has always been considered, and the words have been construed to mean, possession of the goods of another with the consent of the true owner." He adds subsequently, "In all those cases in which that clause in the Act has been permitted to have the effect of devesting the right of the person who had a right to the property, the nature of the possession has always been considered and whether it was according to right." And again he adds: "It has been confined to those cases where the sole and absolute owner of the property has permitted it to remain in possession of the trader in whose possession it ought not to be."

It was of *Joy* v. *Campbell* (1) that Baron Parke more than once observed that it contained "the best exposition of the law" (see 16 Meeson & Welsby, 286).

The order and disposition section of the statute of James I. remained in substance unaltered down to 1869. In 1861 an Act passed which for the first time applied to non-traders the provisions of the bankruptcy statutes, but it made no alteration in the law as to the doctrine of reputed ownership, which in consequence became applicable to goods in the order and disposition of non-traders. Whether this was designed or whether it arose from oversight in not appreciating its full effect, I do not know. My impression is that there was no provision in any of the prior Insolvent Debtors Acts similar to the order and disposition clause. The decisions on reputed ownership had not been uniform, and some of them worked great injustice.

(1) 1 Sch. & Lef. 328.

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A very distinguished Irish judge (Christian L.J.), of whom I may also say that he was a master both in Law and in Equity, in *In re Hickey* (1), dealing with a case arising under the order and disposition clause, thus very vigorously expresses himself: "No interest whatever in the policy passed to the assignees by the vesting operation of the Bankruptcy Act. Assignees step into the shoes of the bankrupt. Nothing passes to them but what was beneficially the bankrupt's own at the time of the bankruptcy. Nevertheless the assignees assert that the order and disposition clause (sect. 313 of the Act of 1857) enables the Court of Bankruptcy to confiscate by a special order this, the admitted property of those two men, for payment of the debt of their assignor. Without going all the way with counsel for the appellant in calling that clause a penal one, we may admit that it is an exceedingly harsh if not an unscrupulous one. It is probably the only instance in our law in which, not only purposely, but avowedly, the property of one man is laid hold of to answer the debts of another. It dates back to the time of James I., if not earlier, and is an example of what most of us have occasion to note, that both the Parliaments and the judges of those older times were bolder in initiative than their modern successors. Surveying the conditions with which the exercise of this exceptional and questionable power has been hedged round by this statute, it is impossible to avoid seeing that of all its requirements the most distinctive and central is 'the consent and permission of the true owner.' All the others may combine. The goods may be in the possession of the bankrupt, they may be in his order and disposition, he may be the reputed owner of them; but unless all this has been sanctioned by the consent and permission of the true owner, the clause rests as a dead letter. And it is this alone which redeems this law from the charge of naked confiscation. As the mens rea is essential for incurring the punishment of guilt, so the mens volens is essential for incurring the forfeiture imposed by this order and disposition clause."

The alterations in relation to "order and disposition" in the Act of 1869, s. 15, sub-sect. 5, and carried further by the 44th section of the Act of 1883, sub-sect. iii., were probably for

(1) 10 I. R. Eq. 129.

the purpose of excluding its operation altogether in the case of non-traders and of narrowing its effect as to traders. Thus by the Act of 1869 it is limited to cases of a bankrupt "being a trader," and in the Act of 1883 its operation is further confined to goods in the "possession, order, or disposition of the bankrupt in his trade or business." These expressions are capable of a different meaning and are by no means identical. Their construction has yet to be determined (see *In re Jenkinson* (1)).

Now, as to the first question of fact which it is necessary to decide on this appeal, viz., Were the shares in question "in the possession, order, or disposition" of the bankrupts, or of either of them, at the commencement of the bankruptcy, we have to consider the position of the parties.

The shares were registered in Blakeway's name, and in that respect he was the sole legal owner, but as such he was a trustee for his firm. Acting on behalf of the firm he pledged the whole beneficial interest to the Colonial Bank, and he delivered to the bank the several certificates of the shares to be retained by them as pledgees. His name continued on the register as registered owner, but as such he was but a trustee—a trustee for the equitable pledgees—and if there was a surplus, as to that surplus for the firm. The firm had not "the reputed ownership," and in the view that your Lordships have expressed it will not be necessary to consider whether Blakeway's name being on the register placed him in "such circumstances as that he was the reputed owner." The shares were not in the order or disposition of the firm. Were they "in the possession, order, or disposition" of Blakeway? The contention that they were rests entirely on his name being still on the register, but something more is requisite. He should also have had the power of disposal. I adhere to what I said in *Société Générale* v. *Walker* (2) as to the nature of these certificates and the effect of parting with them, and am of opinion that, having pledged the shares to the Colonial Bank for value, and delivered to them the certificates to be held by them as their security, he ceased, under the circumstances, to have the power of disposal over the shares, unless possibly by the commission of

(1) 15 Q. B. D. 441. (2) Ante, p. 20.

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not only a fraud but a crime. I am of opinion that at the commencement of the bankruptcy these securities were not in the possession, order, or disposition of the bankrupt Blakeway within the meaning of the statute.

There remains the second question: Are shares of the character in question "things in action" within the meaning of the proviso which concludes sect. 44 of the Act of 1883? On this question I concur in opinion with my noble and learned friends, and adopt the reasoning of Fry L.J. It seems to me, on a careful examination of the section and proviso, that the intention of the legislature was to narrow very much the operation of the "order and disposition" clause so as to confine it to such goods as might be in the order and disposition of the bankrupt "in his trade or business," and, save in the case of "debts due to the bankrupt in the course of his trade or business," to exclude all those incorporeal rights which are not visible or tangible or capable of manual delivery or of actual enjoyment in possession in its ordinary sense, and which, if denied, can be enforced only by action or suit. It is unnecessary for me to express any opinion on another question which was most strenuously pressed in argument by the appellant's counsel.

LORD HALSBURY:—

My Lords, after the judgments which have been delivered, it is unnecessary to detain your Lordships by reading that which I had myself prepared. I concur in the motion of my noble and learned friends.

LORD ASHBOURNE:—

My Lords, I entirely concur in the conclusion at which your Lordships have arrived.

The ordinary rule in bankruptcy is that the assignee takes the property of the bankrupt, but subject to all equities which affected it in his hands.

The question in this case arises on sub-sect. iii. of sect. 44 of the Bankruptcy Act, 1883, which includes in the property of the

bankrupt "all chattels personal being at the commencement of the bankruptcy in *the possession, order, or disposition of the bankrupt* in his trade or business, by the consent and permission of *the true owner*, under such circumstances that he is the reputed owner thereof; provided that *things in action* other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section." The general policy of the order and disposition clauses of successive Bankruptcy Acts rests upon clear and intelligible principles. In the well-known case of *Ryall* v. *Rolle* (1) it is laid down "that the general view and intent of the provision now under consideration was to prevent traders from gaining a delusive credit by a false appearance of substance to mislead those who should deal with them."

The note appended to the certificates has been rightly pressed in argument. It was, at all events, an authoritative assurance by the company of their practice and course of dealing. Any one dealing with the bankrupts had no right to assume that they were the owners of the entire interest in the shares, unless the certificates were either forthcoming or their absence satisfactorily accounted for. Almost any inquiry would have shewn the true facts of the case, and prevented the bankrupts gaining, on this score "any delusive credit," and I see no valid ground for holding that the bankrupts were the reputed owners of the interest of "the true owners"—the Colonial Bank—in the shares. I cannot act on the supposition that the bankrupts could or would by fraud or crime have endeavoured to account for the absence of the certificates. The property of a "true owner" must not be lightly confiscated.

I entirely concur in the judgment of Fry L.J. as to the construction of the proviso and the meaning of the expression "things in action." In the course of his judgment he used the following words: "In the case of a partnership, the real and personal property of the partnership is or may be vested in all the partners, and each therefore may have a legal interest in choses in possession. In the case of a corporation the whole property of the concern is vested in the corporation, and the individual

(1) 1 Ves. Sen. 348, 371.

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corporators have no direct interest in the chattels in possession which may belong to the concern. In a partnership of seven persons each would have a chose in action. If that partnership incorporated itself under the Companies Act, 1862, would each of the seven have "a chose in possession"? In the course of the argument in this House I addressed that question to the learned counsel for the respondent and failed to obtain any satisfactory reply. The special condition of the shares in question strengthens the view at which I have arrived. These shares were, at the date of the bankruptcy, divorced from their certificates, and must in any event to my mind be regarded as clearly things in action."

Order appealed against and judgment of Bacon V.-C. therein affirmed reversed: Declared that the appellants (plaintiffs below) are entitled to the relief prayed by the statement of claim: Costs of appellants in this House and in both the Courts below to be paid by respondent. Cause remitted to the Chancery Division.

Lords' Journals 29th June 1886.

Solicitors for appellants: *Druces & Attlee.*
Solicitors for respondent: *Lawrance, Baker, & Waldron.*

[HOUSE OF LORDS.]

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June 29.

THE COMMISSIONERS OF SEWERS FOR THE LEVELS WITHIN THE LIMITS OF THE PARISH OF FOBBING AND OTHER PARISHES . . . . . } APPELLANTS;

AND

THE QUEEN (ON THE PROSECUTION OF JOHN ABBOTT) . . . . . } RESPONDENT.

Prescription, Liability by, of Frontager to repair Sea Wall—Extraordinary Violence of the Sea—Act of God—Sewers, Commissioners of, Order by, to repair Sea Wall—Presentment of Jury of Liability of Frontager—3 & 4 *Will.* 4 *c.* 22 *s.* 13—*Land Drainage Act* 1861 (24 & 25 *Vict. c.* 133) *s.* 33—*Disqualification of Commissioner by reason of Interest*—23 *Hen.* 8 *c.* 5—13 *Eliz. c.* 9.

A. was a frontager in a level on the Essex shore of the Thames under the jurisdiction of commissioners of sewers. An ancient sea wall protected the level against incursions of the sea. There was evidence proving a prescriptive liability on the frontagers in the level to maintain and repair the portions of this wall respectively fronting their lands. Part of the wall in front of A.'s land was destroyed by an extraordinary storm and high tide. This part of the wall was previously in good repair and in a proper condition to resist the flow of ordinary tides and the force of ordinary storms:—

Held, affirming the decision of the Court of Appeal (14 Q. B. D. 561), and following *Keighley's Case* (10 Rep. 139) and *Rex* v. *Commissioners of Sewers for Somerset* (8 T. R. 312), that in the absence of evidence that the prescriptive liability of the frontagers extended to the repair of damage caused by extraordinary violence of the sea, the liability to repair the damage thus caused to the wall fell not upon A. but upon the whole of the level.

The presentment of a jury at a court of sewers in 1861 found that the then owner of A.'s land was bound by reason of his tenure to repair a portion of the sea wall fronting the land so as to prevent the influx of the waters. In 1881–2 the commissioners of sewers made orders upon A. as the owner of the land to repair this portion of the wall, it having been destroyed by the aforesaid extraordinary storm and high tide. These orders were made "upon reading the presentment" of 1861. One of the commissioners who made the orders was personally interested as an owner of lands within the level:—

Held, that the orders were bad and must be quashed: first, because, following *Reg.* v. *Warton* (2 B. & S. 718), s. 13 of 3 & 4 Will. 4 c. 22,

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which enables orders to be made upon a previous presentment does not authorize an order upon a person who has become owner of the land since the presentment;" secondly, because the presentment being only of the ordinary liability did not justify an order to make good damage caused by an extraordinary storm:—

Held, also, that if the commissioners had made the orders under the powers of sect. 33 of the Land Drainage Act 1861 (24 & 25 Vict. c. 133) they must themselves have found as a fact A.'s liability; that if they had exercised such a jurisdiction they would have been acting judicially, and that in that case the orders would have been invalidated by the fact that one of the commissioners was disqualified by reason of interest.

APPEALS from two orders of the Court of Appeal (1).

One of the orders appealed from affirmed an order of the Queen's Bench Division which ordered a peremptory writ of mandamus to issue commanding the appellants to reimburse Abbott the sum of £3014 1*s.* 8*d.*, incurred by him in repairing the damage done to a sea wall by an extraordinary storm and high tide of the 18th of January 1881, and to make and levy such rates as were necessary. The order of the Court of Appeal further ordered that the writ of mandamus should include in addition to the sum of £3014 1*s.* 8*d.* the two sums of £2738 8*s.* 10*d.* and £6972 16*s.* 10*d.*, subject to a reference to an arbitrator to reassess the amounts if not agreed to.

The facts raised upon the mandamus were stated in a special case, the material parts of which are set out in the report of the decision below (1). The main question raised by the special case was, whether Abbott—who (it was admitted) was bound by prescription, as the owner of Curry Marsh Farm on the Essex shore of the Thames, to repair the sea wall fronting his land contra fluxum maris, and had fulfilled that obligation so as to withstand all ordinary storms and tides—was liable to repair when the wall was damaged by an extraordinary storm; or whether that liability fell upon the level.

The other order now appealed from affirmed an order of the Queen's Bench Division, which ordered that a writ of certiorari should issue directed to the appellants to remove into that Division two orders made by the appellants on the 15th of February 1881 and the 9th of March 1882, and that the orders should be

(1) 14 Q. B. D. 561.

quashed. The orders of the 15th of February 1881 and the 9th of March 1882 were made upon certain frontagers (whose walls had been damaged by the storm of the 18th of January 1881) to repair portions of the sea wall, and in particular upon Abbott to repair certain portions of his sea wall, and they purported to be made upon reading so much of a presentment made at a general court of sewers for the levels held on the 1st of August 1861 as related to the repairing the sea walling and the liability of the owners for the time being of certain lands, and in particular of the owner of Curry Marsh Farm, to repair certain portions of the sea walling.

The presentment of the 1st of August 1861, so far as related to Curry Marsh Farm, was a presentment by the jurors that Robert Warton, junior, being the owner of Curry Marsh Farm, had from time immemorial been used and accustomed and was by reason of the tenure of his land liable to repair at his own costs certain quantities of walling "so as to prevent the influx of the waters from the rivers and creeks surrounding and near to the levels aforesaid (in all which said rivers and creeks the tides and waters of the sea do flow and reflow)."

The orders of the 15th of February 1881 and the 9th of March 1882 were made by several commissioners, one of whom was personally interested as an owner of lands within the levels (1).

May 6, 7. Sir *C. Russell* A.G. and *Finlay* Q.C. (*H. Tindal Atkinson*, with them) for the appellants:—

As to the general question raised by the mandamus, the Act 23 Hen. 8 c. 5 which first established commissions of sewers did not affect pre-existing liabilities to repair: *Keighley's Case* (2). That decision, which is relied on by the Courts below, proceeds upon the finding that the liability in that case was only against ordinary tides, and from the very condensed report of the decision it is impossible to make out what the point decided really was. Here there is evidence in the special case that the frontagers acknowledged the larger liability now contended for and repaired

(1) The Court of Appeal appear to have assumed that two of the Commissioners were so interested, though this was not admitted with regard to one of them: see 14 Q. B. D. 578, 580.

(2) 10 Rep. 139.

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damage caused by extraordinary storms. When a liability is once made out against a frontager it is for him to shew that the liability against extraordinary floods is upon the level. The presumption is that the liability falls upon the frontager: *Reg.* v. *Leigh* (1). A prescriptive liability ratione tenuræ may extend to extraordinary repairs; there is no legal reason to limit it by anything but the ability of the party liable, or the value of the lands granted, as the case may be: *Reg.* v. *Leigh* (1); Callis on Sewers, 144–146. Nor is there any presumption against the more extensive liability. The more convenient presumption would be in favour of holding the frontager bound to repair all damage. Otherwise there would have been no provision for the case of extraordinary damage before the commissioners were appointed. The inference in the present case is very strong that extraordinary repairs have been done by the frontagers, since there is no trace in the records of the commission extending back to 1729 of such repairs having been done at the expense of the level, and it is most improbable that there should have been no extraordinary storm during that period. *Brecknock Canal Company* v. *Pritchard* (2) shews that if a person contract to repair, the obligation is absolute, and extends to extraordinary floods. The principle should be the same where the obligation is by prescription ratione tenuræ, since it must have had its origin in contract.

As to the certiorari, the orders are not invalidated by reason of the interest of some of the commissioners. The commissioners are to be chosen from among the landowners in the district: 23 Hen. 8 c. 5 ss. 1 and 10; 13 Eliz. c. 9 ss. 4 and 7. It therefore could not have been intended that interest should constitute a disqualification for acting. The commissioners' oath (23 Hen. 8 c. 5 s. 5) contemplates that they may be interested. There is nothing to exclude them in the enactments which regulate the proceedings (3 & 4 Will. 4 c. 22 ss. 8, 11, 13, 14, 17, 46) from so acting; on the contrary those provisions seem to contemplate that the commissioners shall be owners of lands within the levels and therefore interested. Moreover, the commissioners in making the orders in question were not acting judicially; and the mere

(1) 10 A. & E. 398, 410.

(2) 6 T. R. 750.

fact that one or more of them were interested is no disqualification: *Ex parte Ward* (1), per Jessel M.R. If the orders are bad the remedy is not certiorari but appeal to quarter sessions as provided by 24 & 25 Vict. c. 133 s. 47. The orders were made under the provisions of that Act.

Arthur Charles Q.C. and *Channell* Q.C. for the respondent were informed that they need not argue the question as to the prescriptive liability of Abbott to repair.

The dilemma put by the Court of Appeal has not been answered and is fatal to the appellants' case. The orders of February 1881 and March 1882 were no doubt made by the commissioners in the belief that they were acting under the Land Drainage Act 1861 s. 33, but if so they were adjudications, and invalid by reason of disqualification on the ground of interest in some of the commissioners. It is a settled principle that no man can be a judge in his own cause; and there is nothing in the provisions of the statutes relied on by the appellants to take this case out of the ordinary rule. If however the orders were made under 3 & 4 Will. 4 c. 22 s. 13, they are bad for the reason given in the decision of *Reg.* v. *Warton* (2). That case shews the course of procedure to be adopted. There is nothing in the Land Drainage Act 1861 to preclude the respondent from following the course he adopted. [They also referred to *Rex* v. *Commissioners of Sewers for Essex* (3); *Neave* v. *Weather* (4); *Stafford* v. *Hamston* (5); and Kennedy and Sandars on Land Drainage and Sewers, p. 133.]

Finlay Q.C. in reply referred to Callis on Sewers, p. 216.

The House took time for consideration.

June 29. LORD HERSCHELL, L.C.:—

My Lords, these appeals come before your Lordships' House in two proceedings which have been taken at the instance of John Abbott against the Commissioners of Sewers for Fobbing.

(1) 20 Ch. D. 356, 360.
(2) 2 B. & S. 719.
(3) 1 B. & C. 477.
(4) 3 Q. B. 984.
(5) 2 B. & B. 691.

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Mr. Abbott is the owner of certain lands within the limits of the commissioners called Curry Marsh Farm, fronting the River Thames, and defended therefrom by a sea wall. And the main question raised is, whether Mr. Abbott was bound to repair this sea wall, which was seriously damaged on the 18th of January 1881 by an extraordinary storm, or whether that obligation rested on the commissioners.

On the 15th of February 1881, and the 9th of March 1882, the commissioners ordered Mr. Abbott to do the necessary repairs. Having made these repairs he applied for reimbursement to the commissioners, and this being refused, he took proceedings against them by applying for a writ of mandamus commanding the commissioners to reimburse him the expenses he had incurred, and to levy the necessary rate for that purpose. A rule was made absolute by the Queen's Bench Division for the issue of the writ, and their judgment was affirmed by the Court of Appeal.

In the mandamus proceedings a special case was stated by an arbitrator; it is there found as a fact that, on the 18th of January 1881, the sea wall was breached by a concurrence of storm and high tide, which was extraordinary.

The first question is, whether the owner of the frontage lands is bound to repair the damage to a sea wall caused by a storm of this character, or whether such liability falls upon all the owners within the level. In *Keighley's Case* (1) it was laid down by Lord Coke that one who is bound by prescription to keep a wall in repair contra fluxum maris discharges this obligation, and is not in default, if he has kept it in repair so as to withstand all ordinary storms, and that he is not bound to keep it in a condition to resist extraordinary storms. This has, I believe, been regarded as the law ever since the time of Lord Coke. It has been recognised in various cases, notably those of *Rex* v. *Somerset* (2) and *Rex* v. *Commissioners for Essex* (3). Certain dicta of Lord Denman, in delivering the judgment of the Court in the case of *Reg.* v. *Leigh* (4), were relied on as expressing a contrary view. But, when considered in relation to the question then before the Court I do not think they were intended to have

(1) 10 Rep. 139.
(2) 8 T. R. 312.
(3) 1 B. & C. 477.
(4) 10 Ad. & E. 410.

the meaning now sought to be put upon them. The only point decided in that case was that a liability of a more extended character than the ordinary one may well exist in law, and may be susceptible of proof.

I think, therefore, that in the present case Mr. Abbott was not liable to repair the damage caused by the extraordinary storm, unless the evidence establishes as against him something more than the ordinary liability of a frontager bound to repair. And I agree with the Courts below that there is no sufficient evidence to establish such extended liability.

Great reliance was placed by the appellants upon the fact that the repairs, as far back as the records exist, appeared always to have been effected by the frontagers, and that there was no evidence of repairs by the level, although there must, it was urged, have been extraordinary storms on occasions other than that which gave rise to the present controversy. But this was the case also in *Rex* v. *Somerset* (1), where, nevertheless, the whole level was held liable.

It was contended upon behalf of the appellants that, even if the liability of Mr. Abbott did not extend to extraordinary contingencies, he was still liable to make good the damage caused by the subsidence of the new wall which took place in the early part of 1882. It was said that this was not found by the special case to have been the result of the extraordinary storm, and that there was nothing to exclude the ordinary liability of the frontager. I have entertained some doubt upon this part of the case, but a careful consideration of the findings in the special case has led me to the conclusion that the better view is that the real cause of the subsidence was the storm of January 1881.

This disposes of all the questions raised by the first appeal.

The other appeal arises upon a rule which was made absolute for a certiorari to remove into the Queen's Bench Division the orders of the commissioners of the 15th of February 1881 and the 9th of March 1882 with a view to their being quashed. The object of this proceeding was to get rid of the difficulty which stood in the way of Mr. Abbott in case these orders were to be regarded as adjudications against him. The Queen's Bench

(1) 8 T. R. 312.

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Division made the rule absolute on the ground that some of the commissioners who were parties to the orders were interested, and therefore incompetent to take part in the adjudications. The Court of Appeal in affirming the judgments of the Court below said "the commissioners were in this dilemma: either that the orders were not adjudications, and if so, they ought not to stand in the way of the issue of the mandamus to reimburse the prosecutor, or they were adjudications, and if so, that they ought to be set aside on the ground that they were made by an interested party."

Both the orders in question purport to be based on a presentment made at a Court of Sewers on the 1st of August 1861, by which it was found that Robert Warton, junior, was owner of the land which is now owned by Mr. Abbott, and by reason of the tenure thereof was bound to repair the portion of the wall therein defined. After reciting this presentment they allege that by the default of John Abbott, the owner of the lands, repairs were required, and order him to do them. Prior to 1833 it was thought requisite that there should be a presentment of liability by a jury on each occasion on which it was sought to enforce the liability to repair. By sect. 13 of the 3 & 4 Will. 4, c. 22, however, it was enacted that where a jury had presented a person as liable to repair a wall, the Court might order him from time to time to make reparations without obtaining on each occasion a fresh presentment by a jury. The orders of February 1881 and March 1882 were obviously made in supposed conformity with the powers conferred by this enactment. But it has been held that the statute does not authorize the commissioners to make an order for repairs upon a person who has become owner since the presentment (see *Reg.* v. *Warton* (1)). Upon this ground alone it appears to me that the orders were properly quashed. Even if the presentment of 1861 had been against Mr. Abbott instead of Warton, I do not think the orders could have been supported. The presentment finds, as I read it, the ordinary liability only, and would not, in my opinion, support an order to make good damage caused by extraordinary storms. But it was contended that the commissioners, in making the orders they did in 1881

(1) 2 B. & S. 719.

and 1882 were acting under the authority of the 24 & 25 Vict. c. 133 s. 33 which empowers commissioners to make, without the presentment of a jury, any order in respect of the execution of any work which they might, but for that section, have made with such presentment. The answer to this contention is that the commissioners did not purport so to act, but founded their order exclusively upon the presentment of a jury. Where, under the statute 24 & 25 Vict. c. 133, they make an order without presentment, they must, I think, themselves determine the questions of liability which would otherwise have to be found by a jury. This they have not done or purported to do. If they had done so, they would, in my opinion, have been acting judicially, and whilst exercising such a jurisdiction they must be subject to the well-established rule that pecuniary interest in any member of a tribunal invalidates its decision.

In any view, therefore, the judgment of the Court of Appeal was right, and must be affirmed.

I therefore move your Lordships that the judgments appealed from be affirmed, and the appeals dismissed with costs.

LORD BLACKBURN :—

My Lords, by order of the Queen's Bench Division, and by consent, a special case was stated, which, after stating at length the facts and evidence, concluded thus :—

"54. The commissioners contend that—

"(1.) The facts and documents stated or referred to in this case establish that the prosecutor was under a general liability to repair the sea wall fronting his land, and that by reason of such liability he was bound to do the repairs referred to in the case, although the necessity for such repair arose from an extraordinary storm and tide or any other cause.

"(2.) That the said facts and documents shew that there is no liability upon the level or any other person to repair the said wall, or to reimburse the prosecutor for the whole or any part of the moneys expended by him in such repairs.

"(3.) That the prosecutor is debarred from obtaining the

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relief sought for in the present proceedings by the existence of the orders of the 15th of February 1881 and 9th of March 1882, unless and until they or either of them be varied or reversed by the quarter sessions, under the provisions of the Land Drainage Act, 1861, s. 47, or otherwise set aside.

"55. The prosecutor contends that—

"(i.) Even if any liability is shewn on him to do any repairs to the sea wall, such liability is at most an ordinary liability to repair by prescription, and does not extend to repairing damage caused by extraordinary floods or storms, or to reinstating such wall after such damage, but in such case the cost should be borne by the level, according to the statute of Henry VIII., as interpreted in *Keighley's Case* (1), and, assuming the prosecutor to be liable in the first instance to pay the cost of such repair and reinstating, he is entitled to be reimbursed.

"(ii.) If the subsidence in 1882 was not due to the storm in 1881, it was due to a latent defect for which he was not responsible.

"(iii.) The orders of the 15th of February 1881 and 9th of March 1882 are not, nor is either of them, conclusive against the prosecutor, and, assuming them to bind him to do the repairs in the first instance, they are not inconsistent with his right to be reimbursed.

"56. The questions for the opinion of the Court are—

"(1.) Whether the cost of repairing the sea wall fronting Curry Marsh subsequent to the 18th of January 1881, under the circumstances hereinbefore mentioned, or any and what part thereof, ought to be borne by the prosecutor or by the level rateably.

"(2.) Whether the prosecutor is entitled to be reimbursed by the commissioners the whole or part, and what part of the said cost, and to have a rate or rates made for that purpose.

"(3.) Whether, in case the prosecutor is not entitled to be

(1) 10 Rep. 139.

reimbursed by the commissioners the whole or any part of the said cost, it is by reason of the orders of the 15th of February 1881 and 9th of March 1882, or either and which of them.

"57. If the Court shall answer either of the first two questions in favour of the prosecutor, judgment is to be entered for the prosecutor on the special case, and such order for a peremptory mandamus or for a reference, or otherwise as the Court may direct, is to be made.

"If the Court shall answer the first two questions in favour of the commissioners, judgment is to be entered for the commissioners.

"If the Court shall answer the third question in the affirmative, the prosecutor is to be at liberty to proceed with his motion for a certiorari and with his appeal to quarter sessions, or with either of such proceedings."

The judgment of the Queen's Bench Division on the special case is to be found in *Reg.* v. *Commissioners of Sewers for Essex* (1), and also in the appendix in this case.

It does not in express words answer the questions stated, but it sufficiently shews that the opinion of the Court was that the two first questions ought to be answered against the commissioners, but that the third question ought in part, but in part only, to be answered in favour of the commissioners.

The final result to which the Queen's Bench Division came is thus expressed: "In our judgment the prosecutor is bound by those orders until they have either been reversed on appeal or quashed by this Court on certiorari. We are, therefore, of opinion that although the liability of the prosecutor does not extend so far as to make him liable to repair damage caused as this was, yet that, so long as the orders in question stand, he is not entitled to a mandamus to reimburse him the expenses he has incurred in obeying them." The order made was accordingly for a writ of mandamus for a part only of the prosecutor's claim.

If this judgment was right as far as it decided that a writ of mandamus should be granted, but either was wrong in holding

(1) 14 Q. B. D. 570.

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that the orders were such as to stand in the way of the prosecutor's right to a mandamus, or if the orders were quashed on certiorari, the peremptory writ of mandamus did not include enough.

The appeal against this order was delayed till after the decision of the Queen's Bench Division on the certiorari. On the certiorari the orders were quashed on the ground that they were adjudications by the commissioners on a question in which one of them had a personal pecuniary interest, and on appeal against the order quashing them the Court of Appeal affirmed it on the ground that the commissioners were in a dilemma, "either that the orders were not adjudications of liability, and, if so, they ought not to stand in the way of the issue of a mandamus to make a rate to reimburse the prosecutor, or they were adjudications, and, if so, that they ought to be set aside on the ground that they were made by an interested party," and I think the dilemma is complete.

The Court of Appeal did not think it necessary to decide on which horn of the dilemma the commissioners were to be fixed. And if the orders were properly quashed for any reason, it was not necessary to decide whether before they were quashed they stood in the way of the mandamus. But I do not think the orders in question were adjudications. I think they were properly quashed, but on a different ground.

Lord Coleridge says that if a jury had found a liability in Mr. Abbott of the more extensive nature contended for by the commissioners, it would have justified a presentment, on a traverse of which Mr. Abbott could have denied his liability; and that until he did so he would not have been entitled to a mandamus. But the presentment of the 1st of August 1861 was not a presentment of any liability in any one greater than that which has all along been admitted by the respondents—a liability to keep in repair, not extending to what is commonly called the act of God. I do not, as at present advised, agree in the construction which Lord Coleridge puts upon the 33rd section of the Land Drainage Act 1861. I do not think that the intention of the legislature was to substitute an appeal to the quarter sessions for a traverse of a presentment. But it is not necessary to decide

this, for the orders are entirely founded on the presentment of the 1st of August 1861; and being so they should be quashed on the ground indicated in *Reg.* v. *Warton* (1).

It is sufficient to justify the quashing of these orders, that the presentment recited in them, and on which they are based, was one against Warton, the predecessor in title of the prosecutor, and there is nothing on the face of the presentment to connect Abbott with him.

This is somewhat technical, but it is noteworthy that on that presentment there is nothing which called even on Warton to deny the more extensive liability, for that is not alleged. If, on any future occasion, a real serious dispute arises as to liability to repair, depending either on the nature of the prescription or the cause of the damage, it will be no great inconvenience to have a fresh presentment.

The orders being quashed, the order of the Court of Appeal now appealed against is right, unless it ought to be found on the statements of the case either that there was established a prescription in this case of a liability to keep in repair against the act of God: or that the subsidence in 1882 was occasioned not by the act of God, but by what Lord Coke, in *Keighley's Case* (2), calls "the default" of the frontager, which is, I think, pretty much the same thing as "neglect of the duty cast upon him by the prescription." I agree in the reasons given on those points in the judgments below, and I do not repeat them.

I think, therefore, both appeals should be dismissed with costs.

LORD WATSON:—

My Lords, in one of these appeals the parties are at issue as to the liability of Mr. Abbott for the cost of restoring a sea wall upon his farm of Curry Marsh, which was breached and seriously damaged by the influx of the tide on the 18th of January 1881. Mr. Abbott admits that he is liable to make all ordinary repairs; but he maintains that the restoration of the wall was not an ordinary repair, and that the cost must be defrayed by a general rate raised from the Level of Fobbing. It is found as a matter

(1) 2 B. & S. 719. (2) 10 Rep. 139.

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of fact, in the special case, that the damage done to the sea wall on the 18th of January 1881, was occasioned by the concurrence of a storm and high tide of an extraordinary character; and also that, at the time when it happened, the sea wall was in good repair, and in a proper condition to resist the flow of ordinary tides and the force of ordinary storms.

It does not appear to me that the law which we ought to apply to the present case is doubtful. The proposition laid down by Lord Coke in *Keighley's Case* (1), seems to establish conclusively that when one bound by prescription to repair a wall contra fluxum maris has kept it in good repair, and of such height and as sufficient as was accustomed, all persons interested in its maintenance must be taxed for the cost of restoration, in the event of the wall being broken, or overflowed, by a "sudden and unusual increase of water," there being no fault in him who ought to repair it. That doctrine has been recognised in subsequent decisions, of which *Rex* v. *Somerset* (2) is a notable example. In that case the whole level was found liable, because the repairs were necessitated by an extraordinary flood, the judgment proceeding upon an admission that previous repairs had always been executed by the frontager, and never at the expense of the level. There is really no authority against the law as laid down by Lord Coke, unless it is to be found in the judgment of the Queen's Bench delivered by Lord Denman in *Reg.* v. *Leigh* (3). Certain passages in that judgment were relied on by the appellants' counsel as establishing the legal proposition that, when repairs have immemorially been made by the frontager alone, there is a presumption that he is liable for extraordinary as well as ordinary repairs. The statements thus founded on were made obiter; and, in my opinion, they were not intended to convey the meaning sought to be attached to them. I think the noble and learned Lord only meant to say that a custom of making extraordinary as well as ordinary repairs would, if proved against him, subject the frontager to liability for both. The expressions his Lordship makes use of are not free from ambiguity; but I am not prepared to put a construction upon his dicta which they do not necessarily

(1) 10 Rep. 139. (2) 8 T. R. 312.
(3) 10 A. & E. 398.

bear, and which would bring them into direct collision with the authority of Lord Coke and the decision of the King's Bench in *Rex* v. *Somerset* (1).

The appellants endeavoured to shew, by reference to the records of the commission, that the owners of Curry Marsh Farm had on several occasions, during the period from 1791 to 1874 inclusive, repaired damage to the sea wall in question occasioned by tides of an extraordinary character, under the orders of the commissioners. Had that been proved as matter of fact, I see no reason to doubt that Mr. Abbott would, as a necessary legal consequence, have been liable to restore the sea wall after the storm of the 18th of January 1881. But the appellants have, in my opinion, failed to establish the custom which they allege. I do not think it necessary to examine the evidence minutely; it is enough to say that, according to my judgment, the facts appearing from the records of the commission would have been altogether insufficient at the time to exempt the owner of Curry Marsh Farm from liability, the custom of making ordinary repairs being admitted; and, consequently, that they are now insufficient to establish his liability for extraordinary repairs.

The only difficulty which I have felt in considering this appeal has been in relation to the subsidence of part of the new wall, which took place in the first three months of the year 1882. Was it a consequence of the mischief done by the storm and tide of the 18th of January 1881, or was it due to other and independent causes? I have come to the conclusion that the first of these questions ought to be answered in the affirmative. I am not much impressed by the circumstance that no direct and positive evidence was adduced in support of either of these views. When an ancient wall, resting on a soft substratum of mud, is destroyed by an inundation, it may be impossible to predict with any degree of certainty that the substratum will be so affected that it will not support a new wall; and it may also be impossible to say, with any greater degree of certainty, that, had there been no such inundation, it would have continued to give efficient support to the old wall. It is, however, an undoubted fact that the subsidence may have been directly occasioned by the flood

(1) 8 T. R. 312.

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of the 18th of January 1881; and, seeing that the lower stratum of mud had, from time immemorial, borne the weight of the old wall, I think its giving way under the pressure of the new wall must be attributed to the effects of that flood, unless it be matter of reasonable inference that it was due to other causes. I assume that, as found in the special case, there is no evidence to shew that but for the storm of January 1881, "the wall as it then existed would not have continued to stand to the present day." In these circumstances, I am of opinion that the presumption of fact must be in favour of Mr. Abbott.

The other appeal raises the question whether the orders made by the appellants upon Mr. Abbott, as owner of Curry Marsh Farm, upon the 15th of February 1881 and 9th of March 1882, ought to be set aside.

It appears to me that, under the statutes which confer jurisdiction in these matters upon commissioners of sewers, it is within the competency of the appellants, in proceeding to make an order for repairs upon a frontager, to adopt one or other of three courses. They may, under the older Acts of Henry VIII. and Elizabeth, obtain the finding of a jury to the effect that the frontager is liable to make the repairs therein specified, and then issue an order in terms of that finding. When a jury has already made a presentment to the effect that any person is liable to repair, they may, during the continuance of the same commission, upon any subsequent occasion, without summoning a jury, make an order upon such person "according to such presentment," in terms of s. 13 of the Act of 1833 (3 & 4 Will. 4 c. 22). Or they may avail themselves of the powers conferred by s. 33 of the Act of 1861 (24 & 25 Vict. c. 133), and may themselves proceed, without the aid of any new or previous presentment, to make any order which, but for the provisions of the section, they could have made with such presentment.

The orders sought to be quashed set forth, as the ground of Mr. Abbott's liability, a presentment made by a jury, upon the 1st of August 1861, against Robert Warton, then owner of Curry Marsh Farm, the predecessor in title of Mr. Abbott. They appear to me to be, both in form and substance, orders made in pursuance of the provisions of s. 13 of the Act of 1833. In that

case they are ineffectual, on the authority of *Reg.* v. *Warton* (1), and they are, in my opinion, null, on this other ground, that the liability which they impose is for extraordinary repairs, that not being a liability "according to" the presentment of 1861, which, as I read it, relates only to ordinary repairs. Assuming, however, that these two orders were made in terms of sect. 33 of the Act of 1861, I am still of opinion that the judgments appealed from are right. Before making such orders, the commissioners must themselves find the facts inferring the liability of the landowner, which were previously ascertained by the verdict of a jury. I am accordingly of opinion that the new jurisdiction given to the commissioners by sect. 33 is of a judicial character; and I can find no warrant for exempting the appellants, if they choose to exercise such jurisdiction, from the wholesome rule that a judge is disqualified from deciding a case in which he is personally interested.

Judgments appealed from affirmed; and appeals dismissed with costs.

Lords' Journals 29th June 1886.

Solicitor for appellants: *J. Plaskett, for Gepp & Sons, Chelmsford.*

Solicitors for respondent: *Thomson, Son & Brooks.*

(1) 2 B. & S. 719.

[HOUSE OF LORDS.]

H. L. (E.) 1886 July 13.

JOHN PHILLIPS, WILLIAM PHILLIPS AND DAVID PHILLIPS . . . . . } APPELLANTS;

AND

MARY FOTHERGILL AND WATKIN HOMFRAY . . . . . } RESPONDENTS.

Practice—Appellate Jurisdiction Act, 1876: *Standing Order I.—Time—Executor—Actio personalis moritur cum personâ—Trespass—Benefit received by Trespasser.*

The decision in *Phillips* v. *Homfray* (24 Ch. D. 439) affirmed on the ground that the appeal was out of time.

THE petition of appeal, presented on the 16th of January 1885, prayed that two orders of the Court of Appeal dated the 9th of July 1883, and an order of that Court of the 24th of January 1884, might be reversed or varied. The orders of the 9th of July 1883, reported as *Phillips* v. *Homfray* (1), affected only the respondent Mary Fothergill. The order of the 24th of January 1884 affected only the respondent Homfray.

The respondent Mary Fothergill having on the 6th of March 1885 presented a petition praying that the appeal might be dismissed so far as it appealed against the orders of the 9th of July 1883, on the ground that it was out of time, the question of competency came before the Appeal Committee on the 30th of March 1885 and was by the Committee referred to this House to determine at the hearing of the appeal. When the appeal was called on—

Rigby Q.C. (*T. Smith Osler*, with him) for the respondent Mary Fothergill raised a preliminary objection to the appeal being heard so far as it appealed against the orders of the 9th of July 1883, on the ground that it was presented more than a year after the date of those orders, and had therefore not complied with the provisions of No. I. of the Standing Orders of the House of

(1) 24 Ch. D. 439.

Lords (1). He contended that the words in that Standing Order, "the last decree, order, judgment or interlocutor appealed from," must mean the last order &c. which affected the subject matter of the appeal; and that since the last orders which affected Mary Fothergill and her liability were the orders of the 9th of July 1883, the year must run from that date and not from the 24th of January 1884; the order of the latter date affecting only the respondent Homfray.

Graham Hastings Q.C. and *F. W. Maclean* Q.C. for the appellants, read affidavits alleging that the appellants had been prevented by poverty from presenting the appeal within the year, and asked that the Standing Order might be suspended, and the time for appealing extended; or if their Lordships had no power during the dissolution to suspend Standing Orders, that the matter might be adjourned till the next session for the House to deal with (2). They admitted that they had found no precedent for so enlarging the time.

[LORD HERSCHELL L.C.:—

We are all agreed (3) that this appeal is incompetent as regards the orders of July 1883 which affected Mary Fothergill; and therefore so far as Mary Fothergill is concerned the petition of appeal must be dismissed. It has hardly been contested that the words "last decree, order, judgment, or interlocutor appealed from" in the Standing Order of this House cannot enable an appellant practically to commence an appeal, after the lapse of twelve months, against a party who is wholly unaffected by the

(1) "Appellate Jurisdiction Act, 1876:

"Standing Order I.

"Standing Order I. is only applicable to decrees &c. pronounced on and after the 1st day of November 1876.

"Ordered, that, except where otherwise provided by statute, no petition of appeal be received by this House unless the same be lodged in the Parliament Office for presentation to the House within one year from the date of the last decree, order, judgment, or interlocutor appealed from. . . ."

(2) The appeals heard during the dissolution in July were heard under the provisions of the Appellate Jurisdiction Act 1876, as in December 1885; see ante p. 20, note.

(3) The other noble and learned Lords were Lords Blackburn, Fitz-Gerald, and Ashbourne.

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subsequent decree or order; and the only ground upon which we have been urged to entertain the appeal against Mary Fothergill is that it is a case of hardship and that there are grounds for extending the time. But certainly it would only be on some extremely exceptional and extraordinary ground that the Standing Order would be suspended, if it ever could be suspended at all. No such ground has been made in the present case, and therefore as regards Mary Fothergill the petition of appeal will be dismissed with costs.]

The appeal so far as it appealed against the order of the 24th of January 1884, which affected only the respondent Homfray, was then heard on the merits and dismissed with costs. It turned entirely on the construction of a decree made by Stuart V.C. and involved no question of law.

Rigby Q.C. and *G. S. Green*, for the respondent Homfray, were not heard.

Orders appealed from affirmed; and appeal dismissed with costs, including, as regards Mary Fothergill, the costs of her petition.

Lords' Journals 13*th July* 1886.

Solicitors for appellants: *Ullithorne, Currey, & Villiers, for Simons & Plews, Merthyr Tydfil.*

Solicitors for the respondent Mary Fothergill: *Field, Roscoe & Co.*

Solicitor for respondent Homfray: *T. W. Denby.*

[HOUSE OF LORDS.]

EDWARD FRANCIS WOODWARD AND OTHERS . . . . . } APPELLANTS;

AND

ELIZABETH GOULSTONE AND OTHERS . RESPONDENTS.

H. L. (E.) 1886 July 16.

Probate—Lost Will—Evidence of Contents of lost Will—Parol Evidence—Declarations by Testator of Contents of lost Will.

If a lost will is propounded for probate upon parol evidence alone, with evidence of a residuary bequest, but no sufficient evidence as to the rest of the will:—

Quære, whether probate ought to be granted of the residuary bequest alone, unless the Court is satisfied that it has before it substantially the testamentary intentions of the testator.

Quære, also, whether post-testamentary declarations of the testator as to the contents are admissible in evidence.

Sugden v. *Lord St. Leonards* (1 P. D. 154) commented on.

APPEAL from an order of the Court of Appeal.

The respondents Goulstone and others as plaintiffs having brought an action in the Probate Division claiming as next of kin administration of the estate of J. H. Morgan deceased with a will of 1868 annexed, the appellants defended the action and set up a lost will of 1877 or 1878 and claimed probate in solemn form. The action was tried before Butt J. who pronounced for the lost will. This decision was reversed by the Court of Appeal (Cotton, Lindley and Fry L.JJ.).

The evidence given before Butt J. is set out in the judgments in this House. The case being reported solely for the observations made upon *Sugden* v. *Lord St. Leonards* (1) it is enough to say that the defendants in setting up the lost will produced no evidence of its contents except some declarations by the alleged testator as to his intentions before the alleged will was executed and some as to its contents after the execution.

The appellants on the 16th of April had presented to the House a petition praying for an order that a commission might issue to

(1) 1 P. D. 154.

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a British consul in the United States of America, to take vivâ voce the evidence of one Perrin, a solicitor, and that the return of the commission might be made to their Lordships to consider, or that the cause might be remitted to the Court of Appeal or the Probate Division, the return of the commission to be made to either of such Courts. The appellants' counsel now read affidavits to the effect that Perrin could give direct evidence as to the contents of the lost will which he was said to have drawn up for the testator.

June 24, 25, 29. *Inderwick* Q.C. and *Bowen Rowlands* Q.C. (*Pritchard*, with them) for the appellants, contended that the evidence was sufficient to establish the will, or so much of it as could be proved, and referred to *Sugden* v. *Lord St. Leonards* (1). As to the additional evidence discovered since the trial they asked the House to remit the cause to the Court below to take further evidence; and referred to Denison and Scott's Appeal Practice of the House of Lords, p. 110, citing *Lord Fingall* v. *Lord Glerawley*, Lords' Journals, Feb. 26, March 8, 1770; and *Birmingham* v. *Graham*, Lords' Journals May 26, 1819.

Fischer Q.C. (*R. Searle*, with him) for the respondents Goulstone and Williams, plaintiffs, contended that the decision of the Court of Appeal was right: and as to the additional evidence referred to *In re Boyse* (2).

Sir *J. Deane* Q.C. (*W. T. Barnard*, with him) for the respondents, Tilly and Kingdon, next of kin.

Yate Lee and *W. D. I. Foulkes*, for Green and James, respondents, co-heirs.

Inderwick Q.C. was heard in reply.

The House took time for consideration.

July 16. LORD HERSCHELL L.C.:—

My Lords, the plaintiffs in this action claim letters of administration as the next of kin of John Hill Morgan. In answer to this claim the defendants, who are the appellants before your

(1) 1 P. D. 154. (2) 20 Ch. D. 760.

Lordships' House, propounded an alleged will of the testator executed towards the latter end of 1877 or the beginning of 1878, and Butt J. granted probate of this will. The Court of Appeal reversed his decision, on the ground that the defendants had not established the contents of the will which they propounded. And I think that they were right in the conclusion at which they arrived.

Both Courts were satisfied that a will was in fact duly executed by Morgan at or about the date mentioned.

The circumstances attending the making and execution of the will appear to have been these. According to the evidence of Mr. Peters, who was a solicitor at Bristol, Mr. Morgan came to his office in the year 1877, and brought with him two papers, one containing a long list of names, which paper is not forthcoming, and the other containing the names of "Dan[l] John Peters, Fanny Taylor Hooper," and "Helen Newark" with "£900" set opposite those names. "Charities in Bristol, viz. and other friends, £1000. Residue freehold and personal to my dear wife Mary Ann Palmer Morgan for her sole benefit and control."

According to Peters' evidence, Morgan, after naming to him certain persons whom he desired to benefit by legacies, told him that his intention was to appoint him, Peters, his executor and residuary legatee; thereupon Peters tore up so much of the instructions as he had already taken down and stated that he could have nothing to do with drawing a will under which he was to benefit; and Morgan accordingly left his office. Some time after this, but when exactly it seems impossible to say, Morgan appears to have gone to the office of Mr. Perrin, another solicitor in Bristol, to have given him instructions for a will, and to have executed that will. I think your Lordships will entertain, as the Courts below have done, no doubt that a will was in point of fact executed by Morgan which had been drawn for him by Perrin. According to Peters' evidence, not long after his first interview he saw Morgan, who told him that he had made his will as he had intended.

Morgan died in the year 1883, and after his death no will could be found. Perrin, the solicitor who had drawn it, had absconded under discreditable circumstances in November 1881 and had been adjudicated bankrupt in April 1882. Upon

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his bankruptcy possession was taken by the trustee under the bankruptcy of all his papers, but amongst those papers no will of Morgan was found. The evidence of a clerk who had been in the employ of Perrin was to the effect that when the will was brought back to Perrin's office it was put in a box with other papers belonging to the affairs of Morgan, which box was labelled with Morgan's name; but no such box was discovered amongst the effects of Perrin at the time when the trustee under his bankruptcy took possession.

The evidence of Peters therefore as to the statement to him with regard to the testator's intentions at the time he was giving him instructions for a will or beginning to give him instructions, and the statement by Peters that some time afterwards he was informed by Morgan that he had made his will as he had intended, are substantially the only evidence before the Court with regard to the contents of the will which has been propounded. It is true that there are certain statements made by Peters in his evidence with reference to what the testator had said to him on other occasions, but I do not think that these carry the matter really any further.

It appears that in the year 1875 the alleged testator had executed a deed of separation between himself and his wife, and that after that time they lived apart,—that in the beginning of 1880, having ascertained shortly before that she had been living in adultery, he had petitioned for a divorce against her, and a decree for that divorce was made nisi in the month of May 1880 and absolute in the December of the same year. Peters states that after his divorce the testator asked him whether the divorce revoked his will. Now I do not think that question put by Morgan, even if it is accurately reported, really throws much light upon the case; indeed it seems a strange question if by his will the testator had made, as is suggested, no provision at all for his wife. One could perhaps understand such a question if there were some provision made for his wife, but it is difficult to understand how anybody could suppose that a will made without giving any benefit to the wife could be revoked by the fact that she had ceased to be his wife.

The other matters deposed to by Peters are first, that the testator spoke to him about giving a benefit to a Mrs. Quick, who had

been one of the persons whom the testator had named as the recipient of a legacy when giving instructions for his will. Then on the 2nd of June 1883, four days before his death, for he died from an accident on the 6th of June 1883, Peters had a conversation with him with reference to a charge which Peters was to make for some small and unimportant work which he had done for Morgan. Morgan proposed to pay him a guinea, and he said that five shillings would be ample, on which Morgan said, "It will make no difference; there will be only so much the less for you as my residuary legatee."

That is substantially the whole of Peters' evidence on this part of the case, and it is substantially the only evidence which we have of the contents of this will; and Peters as residuary legatee, if the will were established, would benefit by it to a very large extent, I think it was stated to the amount of something like £20,000.

The only other evidence which is relied upon on the part of the appellants is the evidence of Woodward, who states that the testator told him that he had left him money, without naming any amount, and also that he had asked him whether he would give up business if he was left £5000; but the witness stated that he had not at that time put the question in the form "If *I* left you," or "If you were left by *me*," but merely "If you were left £5000." And the same witness stated that the alleged testator had told him that the lathes and tools which Morgan had would be his property.

The evidence of Mrs. Peters does not seem to me to support the appellants' case at all, because she states that after Mrs. Morgan's death the testator said that he had left her daughter well off and would provide for *her*. Mrs. Morgan not having died until after the year 1880 a statement of that kind made after her death affords no sort of evidence that before her death Morgan had made a will in which he had left, as is alleged, money to Mrs. Peters.

Mrs. Quick, who is called, states that the testator told her that he had made certain provisions for her; and servants who were in his employ are called to state that he told them either that he would make or had made some provision for them.

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That is really the whole of the evidence; and for my part I am not disposed to place any weight at all, as affording evidence of the contents of the will, upon the statements of Woodward or Mrs. Peters or Mrs. Quick or the servants. I think that common experience shews that persons frequently allege that they have given benefits and made provisions for others after their death when those statements are absolutely without foundation, and are proved conclusively by the production of undoubted testamentary dispositions to have had no foundation. Nothing can be more dangerous, I think, than to accept as any evidence, to carry with it weight, of the contents of a will the evidence of persons of statements made to them of bounties which they are to receive after the death of the person who made those statements.

When we come to look at the evidence of Peters with regard to the contents of the will it seems to me eminently unsatisfactory. No doubt the statement with regard to the residue is clear enough; but as regards the other legacies, upon which of course the amount of the residue would be dependent, it is evidence of a very vague description. When one finds him saying, "I cannot without consideration remember all the names:" "Then there was Mr. Harper; he was to have, I think, 100 guineas; and there was my brother. I think he was to have £500. I know he said he would give him something," and other evidence of that vague and uncertain character, I think that one cannot feel in any measure satisfied that one has before one substantially the contents of the will of the testator.

Of course I do not say that in no case can a will be established by parol evidence. I do not dissent from the view expressed in *Sugden* v. *Lord St. Leonards* (1), where a will which had been propounded was supported by parol evidence; but I cannot help thinking that, as regards the will which was propounded in the present case, some of the legacies contained in it, and the most important legacies, are practically supported by no evidence at all. According to Peters, all that he was told by Morgan, at the time when he was proposing to make his will, about Woodward was that he proposed to leave him something handsome; and, if he did as he had intended, no doubt he did leave him something

(1) 1 P. D. 154.

handsome; but on the strength of the statement by Woodward of this conversation, in which he asked him whether he would give up business if he were left £5000, a will is put forward by Peters, and probate is asked of it, in which the sum of £5000 is left to Woodward. It seems to me utterly impossible to grant probate of a will, or at all events of a part of it, which is only proved by evidence such as that.

Now I cannot but be alive to the extreme danger of establishing a will merely by parol evidence of its contents. The legislature has endeavoured to safeguard the interests and rights of testators by requiring that the expression of their testamentary intentions shall be authenticated in such a manner as to leave no doubt, if possible, that the Court has before it that which really expresses the will and intention of the testator. It is not enough that it is in his own handwriting; it must, even if in his own handwriting, be authenticated by witnesses who must be present and see the testator sign, and must sign in each other's presence. But if upon mere loose statements of the recollection of witnesses as to what has been said to them at some time or other, you were to grant probate of, and to establish as the will of the testator, something which no one had ever seen or purported to be able to depose to from recollection, it seems to me that you would be doing that which would be in the highest degree dangerous, and the more so when those statements are statements of witnesses (and one knows how fallible human memory is even when there is no interest to bias it) who have the strongest possible interest in remembering what they remember and in forgetting what they forget. I think, therefore, that in order to support a will propounded, when it is proved by parol evidence only, that evidence ought to be of extreme cogency, and such as to satisfy one beyond all reasonable doubt that there is really before one substantially the testamentary intentions of the testator.

It is said that at all events the residuary clause is well established, and that upon the authority of *Sugden* v. *Lord St. Leonards* (1) probate of this should be granted even if the Court be not satisfied that it has before it the rest of the testamentary intentions of the testator. In *Sugden* v. *Lord St.*

(1) 1 P. D. 154.

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Leonards (1) the facts were very different from the facts here. The evidence, it is true, was the evidence of a person much interested in establishing the will, but it was the evidence, to begin with, of a person who had seen the will and was giving a recollection of its contents. In the next place, that evidence was corroborated in the strongest possible way and in the most material particulars by written documents about which there could be no question. Moreover the Court were satisfied that although there might be some few legacies which were omitted in the recital of the legacies by Miss Sugden, yet they could not be many but must be few, and that they could not be of any material consequence. The Court were satisfied that they had the substantial testamentary dispositions brought to their minds.

It is quite true that the late Master of the Rolls used certain language upon which much reliance has been placed by the appellants. It is said that he has laid down the proposition that though you have no evidence, except as to the residuary clause, beyond the fact that there are legacies of which you know nothing, you are bound to grant probate of that residuary clause even though you grant probate of nothing else. The language relied on is this (2): "The argument as to the personal estate was this: It was said, if it is proved to your satisfaction that legacies are omitted, then by granting probate of the will which disposes of the residue you are giving a larger proportion of the personal estate to the residuary legatees than was intended for them by the testator, and in so granting probate you are not only not performing the intention but you are acting contrary to the intention of the testator." That was the argument then of those who were opposing the probate. "This argument," says Jessel M.R. "appears to me to be fallacious; it turns on the use made of the word 'intention.' It seems to me that the testator may be said to have in this respect two intentions; he has a primary intention that the legatee, whether general or specific, shall take the legacy; he has a secondary intention that that if by any reason whatever that legacy cannot take effect, then it is to go not to his next of kin but to his residuary legatees. It may well be that we are not able to give effect to the primary

(1) 1 P. D. 154.

(2) 1 P. D. 232, 233, per Jessel M.R.

intention, but we certainly are able to give effect to the secondary intention; and I see no reason why we should not give effect to the secondary intention because the circumstances which have happened have made it impossible to carry out the primary one to the extent of the legacies the amount of which, and the names of the legatees of which, we do not know."

If that is intended to lay down a universal proposition that wherever you have evidence as to the gift of a residue, whatever you may know about the rest of the will and the legacies given by it, and however clear it may be that there were large legacies given by it, if you are not able to prove the amount of those legacies, you are still bound to grant probate of the residue and give the whole to the residuary legatee, I do not say that I dissent from the view, but I certainly hesitate before giving my assent to it. It may be that according to the law as administered in the Probate Court that ought to be done, but certainly, with all deference, I cannot give my assent to the reasons expressed by the late Master of the Rolls. It does not seem to me that the testator always has this secondary intention, that if the primary intention of giving the legacies should fail the residuary legatee should get the benefit. No doubt the law gives the residuary legatee the benefit, though I doubt very much whether the testator ever thinks of it, supposing a legacy to fail. But, accepting that view in a case where the will is forthcoming and a bequest has failed because it is impossible that the object of the testator's bounty can take it, I certainly cannot come to the conclusion that a testator ever contemplates or ever dreams that the residuary legatee is to get the benefit of the whole bequests, supposing that by the loss of the will you are unable to ascertain who the objects of the testator's bounty were, though there undoubtedly were such objects of his bounty whom he intended to benefit in preference to the residuary legatee. It may be a rule of law that under such circumstances you must grant probate and the residuary legatee must have the benefit, but I certainly cannot accept it as being necessarily a carrying out of the intentions of the testator. The Master of the Rolls says that he intends it to go not to the next of kin, but to the residuary legatee. Supposing that a witness comes and says, "I was left residuary legatee under a

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will—I know that there were a great many legacies amounting to a large sum of money, say £100,000, and that there was very little left to go to the residuary legatee. I know that those large legacies were left to the testator's next of kin, but I cannot remember all their names nor how much was left to any one of them"—in that case undoubtedly it was not the intention of the testator that the residuary legatee should be benefited to the exclusion of the next of kin, and you would be defeating his manifest and certain intentions if you were to give the money to the residuary legatee. Would you in such a case be bound to grant probate of the residue upon such evidence as that? I certainly, for my part, cannot help expressing a doubt whether you would, and whether you would ever be justified in granting probate of a will which was proved merely by parol evidence of its contents, unless you were satisfied that you had before you evidence substantially of the intentions of the testator, so that the grant of probate of the residue would substantially carry those intentions into effect.

In this case, which is certainly a very different one from *Sugden* v. *Lord St. Leonards* (1), upon which I do not mean to cast the slightest doubt, it is not necessary to decide that point; but inasmuch as it was urged strongly before us, having regard to the language to which I have just called attention, that we were bound to grant probate of this residuary clause unless we were prepared to impute perjury to Peters, I must say for my part that I cannot assent to that reasoning at all.

There is one other point upon which the Court below was bound by the authority of *Sugden* v. *Lord St. Leonards* (1), but which would be open to review in this House, and upon which I desire to reserve my opinion. It will be observed that the only evidence of the contents of the will in this case are the post-testamentary declarations of the testator. If these declarations be inadmissible, then there is absolutely no evidence to support the case of those who are propounding the will. As the Court below came to the conclusion that even admitting them the will was not established, and as we concur (for I believe all your Lordships concur) in that view, of course the question does not

(1) 1 P. D. 154.

arise here for determination; but as far as I am concerned I desire to guard against its being supposed that I hold that these post-testamentary declarations are admissible. It is a matter which has given rise to considerable difference of judicial opinion. Lord Penzance distinctly decided that they were not admissible (1); and I think a dictum of Lord Campbell in the case of *Doe* v. *Palmer* (2) indicates that he took the same view. The majority of the Court of Appeal in *Sugden* v. *Lord St. Leonards* (3), consisting of Cockburn C.J., the late Master of the Rolls, James and Baggallay L.JJ., were of opinion that the evidence was admissible, but Mellish L.J. took the contrary view. The reasons of the Master of the Rolls for holding this evidence to be admissible will be found at page 241 of the report. He lays down first of all the general rule of law, which he admits would exclude statements of this description, but then he says there are certain exceptions, certain principal exceptions and certain subordinate exceptions. The principal exceptions which he names are, declaration accompanying an act, declaration against interest, and declaration made by a person in the course of business and which it was his duty to make. The subordinate exceptions which he names are in matters of public and general interest, and in matters of pedigree. Undoubtedly those are all well recognised and long established exceptions to the general rule. But the Master of the Rolls proceeds to say that there is a principle underlying all those exceptions, and that principle he states thus: "In the first place the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is disinterested in the sense that the declaration was not made in favour of his interest. And thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly (and this appears to me one of the strongest reasons for admitting it), the declarant must have had peculiar means of knowledge not possessed in ordinary cases."

(1) *Quick* v. *Quick*, 3 Sw. & Tr. 442; 33 L. J. (P. M. & A.) 146.
(2) 16 Q. B. 747, 757.
(3) 1 P. D. 154.

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And finding that principle underlying the exceptions to which the Master of the Rolls has alluded he then seems to come to the conclusion that whenever you find those conditions satisfied you are justified in making a new exception although it has never hitherto been recognised in the law.

It appears to me that if that view be adopted the extension of those principles to a case like the present would equally afford authority for many additional exceptions hitherto unknown to the law. It is much broader than would merely support the particular extension of the exceptions which the Master of the Rolls was then upholding; and I cannot help feeling that for the Courts to add at will from time to time any new exceptions which appear to be capable of being supported on principles similar to those which have been long established would be introducing a dangerous uncertainty into the law of evidence. It appears to me that there is much to be said in support of the view which is forcibly expressed by Mellish L.J. (1). He says "it does not come within any of the rules which have been hitherto established, and I doubt whether it is an advisable thing to establish new exceptions in a case which has never happened before and may never happen again, for you then establish an exception which more or less throws a doubt on the law. It appears to me that it would be better to leave it to the legislature to make the improvement, which in my opinion ought to be made, in our present rules with regard to the admissibility of evidence of that description." No doubt there are many countries, and, indeed, Scotland is one of them, where the law permits declarations of persons who are dead to be given in evidence, in all cases where they were made under circumstances in which such evidence ought properly to have been admitted if the person had been living; and there is much to be said for that law as compared with our own; but certainly I have always understood that law to differ from our law, and I cannot help feeling that if one were to adopt to the full the reasoning of the Master of the Rolls it would practically wipe away all such distinction, which is in my opinion the function of the legislature and not of the Courts.

I do not desire to be understood as dissenting from the judg-

(1) 1 P. D. 251.

ment of the majority of the Court of Appeal in *Sugden* v. *Lord St. Leonards* (1) upon this point. I have expressed the doubts which I entertain; all I desire is to leave the question open should it hereafter come before your Lordships' House for decision.

That disposes of all the matters arising upon the appeal, and I move your Lordships that the judgment be affirmed and the appeal dismissed with costs.

Your Lordships heard at the same time as the appeal an argument in support of a petition presented by the appellants for the reception of fresh evidence, or that the House should remit the case to the Court below in order that fresh evidence might be taken. I think that the first course would be in any case out of the question, and that if such relief could be given at all it could only be given in the way of remitting the case to the Court below for further evidence to be taken; but that is an application which could only be assented to by this House under very special circumstances and where the House was satisfied that it was essential in the interests of justice.

The evidence which it is sought to add to the evidence already before your Lordships' House, and which was before the Court below is the evidence of Perrin, whose whereabouts it is said could not be discovered, or was not discovered, at the time of the trial, but who has since been communicated with, and whose evidence it is said could now be obtained on commission. I must say that when an application of this kind is made those who make it are bound to give the most ample information which it is possible for them to give in relation to the communications which they have had with regard to the matter and the efforts which they have made to obtain the evidence; and I cannot say that such candour has been displayed on the present occasion. There were many letters which ought to have been disclosed in the affidavits which were not disclosed; and looking at the circumstances under which the communications took place between the appellants and Perrin, and the substance of those communications, I think all your Lordships are satisfied that you ought not to grant the prayer of this petition. I desire to make no comment, beyond

(1) 1 P. D. 154.

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what I have said, upon those communications or upon the evidence which Perrin might or might not give, because it is possible that that matter may hereafter come before the Courts for decision. All that I say at present is that a case is not made out for the exceptional course which the appellants ask us here to take. It may be that they can propound the will again with this fresh evidence; upon that I say nothing. If that course is open to them they may, if so advised, pursue it; and I have abstained from making further observations than were absolutely necessary upon the communications with Perrin or the evidence which he is likely to give, by reason of the fact that it is possible they may be advised to take fresh proceedings in this matter.

I therefore move that the prayer of the petition be not granted.

LORD BLACKBURN:—

My Lords, I agree completely in saying that the judgment appealed against, the judgment of the Court of Appeal, in which they held that upon the evidence before them the contents of the will were not sufficiently established, therein reversing the decision of Butt J., was right. I think that on that evidence there was no evidence of the contents of the will. The evidence consisted exclusively of parol statements of this nature: Peters said (and I do not say that there was any reason to suppose it was not true) that the testator came to him and told him that he wished to make his will; that he proceeded to give him directions for making the will; that this went on all very well, he taking down the directions, until at last they came to the point of who was to be the residuary legatee, and then, according to Peters, the testator said "It is to be my oldest and best friend, and that is yourself," upon which, according to Peters' evidence (and I am not at present saying that it is not rightly to be believed) Peters said "If that be so I cannot make your will," tore up all he had written down, and told Morgan, the testator, that he would not draw such a will as that. That was all very right and scrupulous if it were so. Morgan then went away, and, according to Peters' evidence again, some time afterwards Morgan told him that he had taken his advice and had gone to another

attorney and had had the will drawn up as he had intended. I think those are the words or nearly so, but it is not very material to be precise about the words. Then some years elapse, and then the testator dies, and in his receptacles and amongst his papers no trace of any such will or of the employment of any such attorney, or anything of the sort, is found. Still it is quite possible that he may have employed such an attorney who may have drawn up such a will. Then there is further evidence given that he did speak to different persons, members of his family, on the subject, and that he told Peters himself something like this: "My will is still in existence, and it makes you residuary legatee;" and to various servants he said "I have made my will and have remembered you," or "will remember you," or things of that sort. All those would be things going to shew that there was a will. That was the sort of evidence which was given.

Then (and this is what I want to lay more emphasis upon) years having elapsed in that way, Morgan being dead and nothing whatever being found about this will, Peters begins to offer rewards and to go about seeking for evidence, and he succeeds in finding three different clerks of a Mr. Perrin, who had run away under not reputable circumstances. I need say no more than that he was an attorney who had run away from Bristol. One of the clerks says that he was in Mr. Perrin's employment, and that a certain box contained a will and other papers belonging only to Mr. Morgan, and that by Mr. Perrin's direction he wrote "J. H. Morgan" on a label and affixed it to the box. This was before Perrin had run away. If believed, that evidence would shew that Perrin was acting as Morgan's attorney and had made the will.

Two other witnesses are called, whose evidence does not seem to be shaken, and to whom nothing is imputed. One says "I was a copying clerk of Mr. Perrin's before he went away. I remember his giving me a draft of a will to copy and engross. I did copy and engross it, but as to remembering the contents of it I remember nothing about them." The third witness says, "I was a clerk of Mr. Perrin's and I remember going with him to Mr. Morgan's house, when he took in the will to Mr. Morgan, and

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I was called in, and I and Mr. Perrin witnessed the will." All this tends to shew, and it is evidence enough to shew, that such a will was executed; but there is not one morsel of evidence of its contents. Now the really important question is, Is there evidence enough of its contents? I am not going further into it than this, that I think the evidence which I have mentioned, the declarations of the deceased, such as "I have remembered you in my will" or "treated you handsomely" or anything of that sort, if admissible are evidence that should in my mind have very little weight indeed given to it.

I wish to guard myself, as the Lord Chancellor did, against being supposed, except so far as it is necessary for the present case, to be either affirming or disaffirming the decision which was come to in *Sugden* v. *Lord St. Leonards* (1), or the propositions of law there laid down. I wish to leave them just in the same way as before, as far as I am concerned. Very considerable reasons have been given for doubting some of the propositions and doctrines laid down there, and they may be shaken to some extent; but the decision of this House will not make that case better or worse as an authority than it was before. It is quite sufficient to say that if these declarations are admissible as evidence and are treated as such they certainly are not sufficient to shew what the contents of the will were, and therefore the judgment appealed against is right.

As to the application that there should be additional evidence taken on a commission issued to take it, I avoid saying anything further than this; that it is a very peculiar application, which, if the House could grant it at all, would require very strong and peculiar circumstances to justify it. It may be that in some further proceeding the appellants may have a right to bring additional evidence. It is conceivably possible that they may, now that they have discovered Perrin, find that the will is in existence and produce the actual instrument. But it is possible also that they may by means of Perrin get sufficient evidence of the contents of the will to be satisfactory to the Court. I say nothing about that. All I do say is that this House has no case before it to justify it in granting the application. In refusing it

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we are not to be understood as saying that the Probate Court, if further proceedings are taken and applications are made to it, is to be guided by our refusal, as if it were as much as to say that that Court was not to permit such evidence to be received; but it only comes to this, that we have not a case made out for doing it now.

That being so, I concur in the motion.

LORD FITZGERALD:—

My Lords, I concur in thinking that the decision of the Court of Appeal ought to be affirmed. I am quite willing to follow the great judges who decided *Sugden* v. *Lord St. Leonards* (1) in the conclusions at which they finally arrived, but am not disposed to go one hair's breadth beyond. That case might be truly said to have reached the very verge of the law and it ought not to be extended.

The short view which I take of this case is that there is no satisfactory evidence of the contents of this will. I shall say a word presently as to the factum of the will, but assuming that the factum of *a* will has been established to the satisfaction of the Court I can find no evidence whatever as to the contents of the will which would justify the Court in acting upon it.

The declarations of the testator have been offered and received in evidence. Still even the testator, after the supposed execution of this testamentary instrument, never tells us what its contents were. There are some obscure statements, no doubt, such as that he made a will according to his expressed intention, but beyond that there is no evidence whatever of any statement by him of the contents of the will; and if I were acting as a judge in the Probate Court, I should hold that there was no evidence sufficient to warrant me in granting probate of the supposed will.

There is another question, namely, whether even supposing that there was some satisfactory evidence of the residuary bequest the Court ought to grant probate of the residuary bequest alone, for the reasons stated in *Sugden* v. *Lord St. Leonards* (1). I do not intend to express any very strong opinion upon that, for I do not think that that question is before us. I do not think that

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there is any satisfactory evidence that there was in this will a residuary bequest in favour of Peters. He never saw it; the testator never tells us of it; and the witnesses in favour of the factum of the will, who are produced under circumstances not free from suspicion, do not tell us one word as to the contents of the will or of this residuary bequest. A testator when dealing with the residue of his property must be taken to contemplate that the bequests previously given, or some of them, may fail,—that a legatee may die,—and therefore he may be deemed to have had the intention that the lapsed legacy should fall into the residue; but it is a very different proposition indeed that he intended that if his will were stolen or lost and there were no evidence of the other bequests contained in it the residuary legatee should take the whole of his property. Here the personalty is estimated at £25,000 and the realty is said to be worth £10,000. If we accepted that proposition we should infer that the testator intended, under such circumstances as are supposed to exist in the present case, that the residuary legatee was to take the whole of his estate. Whenever that question comes to be fairly raised and discussed it will be for the House to decide it, but it is in no way before us.

A good deal has been said as to the admissibility in evidence of parol statements of testators alleged to have been made after the factum of the will. Upon that I wish to reserve my opinion. My impression is that however such statements of the testator were dealt with in *Sugden* v. *Lord St. Leonards* (1) the true ground upon which such evidence ought to be received, if received at all, was not fully discussed, and it is not necessary to decide it now. Therefore I reserve my opinion upon it.

There only remains the application to postpone the decision in this case and remit the cause to the Court below to take the evidence of Perrin by commission or otherwise. That is a somewhat perilous step to take, and I do not think that we should be justified in taking that course unless we were clearly satisfied that the evidence was such as would be fairly reliable and go to the very point at issue between the parties. The affidavits which were read the other day, so far from satisfying my mind cast

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suspicion upon the whole case. For the first time it turns out upon these affidavits that when Peters had taken possession of the property of the testator he did not originally make this case which he now makes of a will with a bequest of the residue in his own favour. Whatever had taken place between himself and the testator on that subject seems to have escaped his mind. He rested upon a very different document, a will which is in existence, in fact a prior will of the testator. He then proceeded by advertisements, I presume by offers of a reward, to see if any one could tell whether another will had been executed, and then two clerks appeared. That is an element, I will not say of suspicion, but requiring most careful consideration before you take it that the factum of the will has been established. In addition it is observable in this case that those two witnesses, who profess to have seen this document, never tell us a word of its contents. Why do they call it a will? One of them never read a word of it. I mean the clerk who went to witness its execution. The clerk who is alleged to have made a fair copy of it cannot even tell us a syllable as to the remarkable thing that there was in that will which he so copied, a residuary bequest in favour of Peters. Upon the whole it is not to my mind very clear that the factum of the will has been satisfactorily established.

Then we have to deal with the application as to Perrin. The affidavits are to me very unsatisfactory, looking at the mode in which Perrin's evidence has been called for, and the demand for a stipulated consideration on his part. I do not object to a sum of money in the first instance to pay his expenses, but it is plain that he was only willing to give evidence upon the supposition that if his evidence was effective hereafter he was to be rewarded for it. And even when we do come to it he recollects nothing that we can rely upon but the residuary bequest in favour of Peters. In my opinion it is not under such circumstances that the House should depart from its ordinary course, postpone its judgment, and remit the cause, not for the examination of Perrin vivâ voce before a competent tribunal in this country, but for his examination upon written interrogatories under commission in America. This is not a case in which the House ought to depart from its ordinary course and suspend further proceedings. We

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have the satisfaction of knowing that if this will is ever discovered, or if there is persuasive and satisfactory proof which will enable the Court to say that the will and its contents have been established, the parties may propound the will again.

Orders appealed from affirmed and prayer of petition of 16th April not granted; appeal dismissed with costs, including the costs of the petition of the 16th April.

Lords' Journals 16th July 1886.

Solicitors for appellants: *Freemans & Dicker, for C. A. Peters, Bristol.*

Solicitor for respondents Goulstone and Williams, plaintiffs: *W. Vaughan Williams.*

Solicitors for respondents Tilly and Kingdon, next of kin: *Guscotte, Wadham, & Daw, for W. E. Lawrence, Bristol.*

Solicitor for respondent Green, co-heir: *J. H. Bridgford, for J. E. Jones, Halifax.*

Solicitor for respondent James, co-heir: *W. J. Foster.*

[HOUSE OF LORDS.]

TOSH AND OTHERS . . . . . APPELLANTS; H. L. (Sc.) 1886 July 30.

AND

NORTH BRITISH BUILDING SOCIETY AND LIQUIDATOR . . . . . } RESPONDENTS.

Building Society—Winding-up—Borrowing Members and Losses inter se— 6 & 7 *Wm.* 4, *c.* 32.

The rules of a benefit building society provided that borrowing members who had given heritable securities for an advance could redeem their bonds either by (1) giving three months' notice that they renounced their shares, and paying the amount of the advance under deduction of instalments paid and interest thereon; or (2) by payment of the whole sum borrowed, retaining their shares; and that when the subscriptions with the share of profits of such members were equal to the amount advanced, then their payments and connection with the society were to cease.

In 1884, losses having occurred, the society was ordered by the Court to be wound up. There were no outside creditors:—

Held, reversing the decision of the Court below, that the case was governed by *Brownlie* v. *Russell* (8 App. Cas. 235), and that the borrowing members were entitled to have their securities discharged in the terms of the rules, and were not bound to remain members and bear a share of the losses incurred by the society.

APPEAL from the First Division of the Court of Session, Scotland, on a special case.

The North British Building Society was established in Glasgow in 1863, under the provisions of the 6 & 7 Wm. 4, c. 32. The appellants are borrowing or advanced members of the society. The respondents are the society and its liquidator. The main question raised by this appeal was whether the borrowing members of the society were entitled to redeem the properties given by them in security to the society, and to have their bonds discharged, and be freed from all liability as contributories or otherwise to the society, on paying up the amount of the advances made to them (with any interest due thereon), under deduction of the instalments already paid by them (with periodical interest thereon), or alternatively on paying such sum, as, together with the instalments already paid, and profits allocated to their shares,

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shall equal the amount of the advance. A subsidiary question was whether borrowing members were entitled to credit for profits allocated to their shares. There was also a question whether borrowing members had the option to pay up the balance of the sum borrowed by fortnightly instalments, or were bound to make payment after three months' notice by the liquidator; but the appeal on this point was withdrawn at the bar.

For some years the society made profits, and these were duly declared under the rules; and after setting aside a reserve fund, the remainder was allocated to the members, borrowing and non-borrowing, in proportion to the amounts respectively standing at their credit on their shares. Losses having been sustained, the reserve fund was absorbed. A valuation taken on the 11th of April, 1882, shewed great depreciation of the society's securities.

On the 13th of May, 1882, the trustees of the society issued a circular to all the shareholders, inviting them to give notice of withdrawal, in order to prevent withdrawing shareholders acquiring a preference on the funds.

From this date the business of the society was practically at an end; and it only existed for the purposes of liquidation.

On the 26th of February, 1882, the trustees of the society presented to the Court a special case, raising various questions and embodying the above facts.

On the 19th of July, 1884, the Court ordered the society to be wound up by the Court, and appointed an official liquidator, who was allowed to become a party to the case raised by the trustees. The rules of the society were very similar to those of other building societies and need be but briefly summarised here:—

(3.) The capital of the company shall be raised in shares of £25 each, payable by fortnightly instalments of 1*s.* 3*d.* per share, and interest arising thereon.

(13.) Any member holding any share in respect of which no advance has been made, which by the subscription paid in, and the profits thereon, shall have accumulated to £25 (the amount of said share) shall be entitled to receive the amount thereof, with bank interest from the date of the completion, and his connection with the society in respect of the same shall cease, but the directors shall not be bound to pay said shares sooner than three months after the same have been ascertained to be due, and the same shall only be payable along with withdrawals in their order, and as the funds shall permit.

(14.) Any person holding shares on which six months' subscriptions have

been paid, and who is not more than one month in arrears shall be entitled to apply for an advance. All advances shall be made on the security of heritable property.

(15.) A member receiving an advance shall pay interest thereon at the rate of 5 per cent. an the full amount of the advance.

(26.) Any member who has received an advance from the society upon the security of any property, may, with the consent of the directors, transfer his or her right and interest in the same to any other person, along with the shares representing the same, provided all arrears, &c., are paid.

(27.) Any member who has given any property in security to the society may, on giving three months' notice prior to the term of Martinmas or Whitsunday in any year, redeem the same, by renouncing the shares representing the advance made thereon, and paying the amount of said advance, under deduction of the instalments paid in respect of the same, and interest thereon, and his interest in said society, so far as said shares are concerned, shall cease; or any member who has given any property in security to the society may redeem the same as above by payment of the whole sum borrowed and other dues thereon, and retain his shares in the same manner as if no advance had been made in respect of said shares, and he shall be entitled to have the same re-advanced to him in terms of Rule XXVI.; or when the subscriptions, with the share of profits, of any member who has received an advance, are equal to the amount of said advance, then the payments of said member, in respect of said shares on which the advance has been made, shall cease, and his connection with the society in respect of the same shall terminate.

(28.) The society's books shall be balanced by the manager annually, at the end of November, and the profits of the year shall be ascertained, and after setting aside a sum out of the same as a guarantee fund, to meet any losses that may be sustained, divided equitably among the shares, and carried to the credit of each member's account in the society's books, and also entered at the end of the members' pass-books; but, except to the extent stated in Rule XII., shall not form part of the funds that can be withdrawn from the society, until the shares are fully completed.

A new rule was passed on the 25th of August, 1882, to ensure that borrowing members would be in safety to continue their payments to the society—without increasing the liability which might rest on them as shareholders. It was as follows:—

All payments received from borrowing members due from and after the 11th day of April, 1882 (the date when the directors resolved to obtain a valuation of the securities of the society) shall be attributed not to their shares but to account of the sums due under their bonds to the society without prejudice to the present position of borrowing members.

The special circumstances of the case of the appellant Tosh, called in the special case the sixth party, were as follows:—

(24.) The sixth party originally held forty shares in the society, issued to him at various dates. On or about the 20th of November, 1871, he obtained an

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advance of £1000 from the society, being the nominal amount of his shares, and in security of the said advance he granted a bond and disposition in security. From time to time thirty-two of the shares held by the sixth party were completed by the due and regular payment of instalments and the addition of profits till the amount at the credit of these shares was equal to £25 per share; and the society thereupon discharged the said bond and disposition in security to the extent of £800, being the nominal amount of the said thirty-two shares. At or before the 30th of November, 1882, there stood at the credit of the remaining eight shares held by the sixth party the sum of £191 19*s.* 1*d.*, which included £35 19*s.* 1*d.* of profits allocated on these shares. He paid interest on the £200 remaining undischarged of the said bond up till Martinmas, 1882, and on the 6th of December, 1882, he made payment to the society of £8 0*s.* 11*d.*, thereby, as he contends, repaying the remaining balance of his bond. Had he continued to pay instalments regularly on the said eight shares, in terms of Rule III., the payments would have continued till June, 1883. The sixth party maintains that he is entitled to cease being a member of the society, and to have his bond and disposition in security discharged, in terms of Rule XXVII., without any further payment, and that he is not liable to bear a share of the loss sustained by the society in proportion to the sum standing at his credit on his shares at the 11th of April, 1882.

And the question to his case was as follows:—

5. Is the sixth party entitled to cease being a member of the society, and to have his bond and disposition in security discharged in terms of Rule XXVII., without any further payment, or is he liable to bear a share of the loss sustained by the society in proportion to the sum standing at his credit on his shares at the 11th of April, 1882, and in any event is he liable for interest on his bond up till June, 1883?

The appellant Guthrie's case was:—

The seventh party (1) took out sixteen shares in the society in September, 1869, at the credit of which there stands in the books of the society £400, or £25 per share, the last payment made by the seventh party towards the said shares being on the 18th of May, 1881. The said sum of £400 includes £98 17*s.* 4*d.* of profits allocated on the said shares. He is also (2) a holder of twenty-four shares, taken out by him in December, 1873, at the credit of which there stands in the books of the society the sum of £351 5*s.* 1*d.*, which includes £39 17*s.* 1*d.* of profits allocated thereon. He is also (3) a holder of sixteen shares, taken out in December, 1873, by Benjamin Ford, a member of the society, and transferred by him to the seventh party, at the credit of which there stands in the books of the society a sum of £234 3*s.* 4*d.*, which includes £26 11*s.* 4*d.* of profits allocated thereon. On or about the 15th of May, 1876, the seventh party obtained an advance from the society of £600 against the said twenty-four shares, and on or about the 20th of November, 1877, he obtained another advance of £400 against the last-mentioned sixteen shares, and he granted bonds and dispositions in security for the amount of said advances. The seventh party paid interest on the said advances of £600 and £400, at the rate of 5 per cent. per annum, half-yearly up till Martinmas, 1881. On the

27th of April, 1882, the seventh party, through his law agents, gave intimation to the manager of the society of his intention to withdraw from the society "as regards the shares not yet fully matured," and of his desire to apply the sums at the credit of all his shares towards his bonds, and to pay up any balance that might thereafter be due by him to the society. The seventh party maintains that he is entitled to a discharge of his bonds upon payment of the difference, if any, between the amount of his bonds, namely £1000, with interest thereon down to the 27th of April, 1882, on the one hand, and, on the other hand, the amount at the credit of (1) his sixteen earlier completed shares, with bank interest thereon from the date of their completion, and (2), his forty later unmatured shares, with periodical interest on the amount of instalments from time to time paid on said shares to the 27th of April, 1882. He also maintains that the interest for which he is entitled to credit on the amount of his forty unmatured shares should be at the rate of 5 per cent.

And the question to be answered by the Court was as follows:—

(6.) Is the seventh party entitled to a discharge of his bonds, and to cease to be a member of the society upon payment of the difference, if any, between the amount of his bonds, with interest thereon down to the 27th of April, 1882, on the one hand, and, on the other hand, the amount at the credit of (1) his sixteen earlier completed shares, with bank interest thereon, from the date of their completion, and (2) his forty later unmatured shares, with periodical interest on the amount of instalments from time to time paid on said shares at 5 per cent. to the 27th of April, 1882; or does he fall to bear a share of the losses of the society in proportion to the sum standing at his credit on his shares, or any of them, or in what other way is he to be settled with?

Finlay's case was, as far as material, as follows:—

27. The ninth party is a shareholder of the society holding twenty-four shares, issued in September, 1877. At that date he applied for a loan of £600, and the society agreed to grant the same on his taking out shares corresponding to the amount of his loan, and paying instalments thereon from the commencement of the financial year, viz., the 1st of December, 1876. On the 28th of September, 1877, he paid the instalments required, and the shares were then issued to him, and dated December, 1876, accordingly. On or about the 6th of October, 1877, he obtained from the society the said loan or advance of £600, being the nominal amount of his shares, for which he granted in favour of the society a bond and disposition in security. The sum at the credit of the said twenty-four shares at the 11th of April, 1882, including £6 6*s.* 9*d.* of profits allocated thereon, amounted to £127 10*s.* 3*d.* The ninth party has made no further payments to the society, except the termly interest due on said advance. On or about the 16th of May, 1882, the ninth party, in compliance with the directors' suggestion contained in the said circular of the 13th of May, 1882, sent notice to the society withdrawing his shares, using, for that purpose, the printed form issued with the circular. But while taking that step for his protection quantum valeat, he has intimated to the directors of the society his desire to continue paying up his advance by instalments as formerly, under Rule III. The ninth party maintains that he is entitled to complete his shares

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by paying up the instalments which remain due thereon, as formerly (as mentioned above, this contention was withdrawn), getting credit for all profits which have been allocated upon his shares, and that upon such completion he is entitled to have his bond discharged and to cease to be a member of the society without any liability for its losses. He further contends that, while his instalments remain unpaid, he is not bound to pay to the society the interest on the full amount of his advance, but is entitled to have the interest rebated to the extent of the reduction effected by previous instalments and allotted profits in the amount of the principal sum due.

The question to be answered so far as material was :—

(8.) Is the ninth party, upon payment of instalments amounting in cumulo to the difference between the sum at his credit on his shares, including profits allocated thereon, and the amount of his said advance, entitled to have his bond discharged; and is he liable, so long as any of said instalments remain unpaid to pay to the society interest at 5 per cent. on the full amount of said advance, or is he entitled to have the said interest abated to the extent of the reduction effected on the principal sum due by previous instalments and allotted profits. Or does he fall to bear a share of the losses of the society in proportion to the sum standing at the credit of his shares at the 11th of April, 1882.

On the 10th of July, 1885, the Court of Session found, inter alia, as follows :—

In answer to Query 5, find and declare that the sixth party is liable to bear a share of the loss sustained by the society in proportion to the sum standing at the credit of his shares, as at 11th of April, 1882. In answer to Query 6, find and declare that, so far as regards the seventh party's sixteen completed shares, he is entitled to be paid the instalments at his credit, with interest in terms of rule 12, without deduction, as soon as the funds of the society permit, and in preference to all members whose shares were completed, or who gave notice of withdrawal subsequent to the date when the shares were completed. But so far as regards the other shares held by him in respect of which the advances mentioned in article 24 of the case were made, he is liable to bear a share of the losses sustained by the society in proportion to the sum standing at his credit on those shares as at 11th of April, 1882. In answer to the 8th Query, find and declare that the ninth party is liable to bear a share of the losses sustained by the society in proportion to the sum standing to the credit of his shares at the 11th of April, 1882; that the power of withdrawal is limited to shares on which no advance has been made; and that the ninth party has no preference in respect of his intimation of withdrawal, and is liable to pay the balance due on his bond, and interest, at the term of Whitsunday or Martinmas, after three months' notice by the liquidator (1).

July 13, 16, 19. Sir *H. Davey*, S.G., and *Farwell*, for the appellants :—

The judgment of the Court below was erroneous. First, because

(1) 12 Court Sess. Cas. 4th Series, 1271.

the Court went on the ground that *Brownlie's Case* (1) was different, because there the borrowing members could not participate in profits; but that was clearly a mistake.

[LORD HERSCHELL, L.C.:—I argued myself in that case that the advanced members had a right to share in contingent profits.]

Secondly, this was a question between members inter se, and the appellants claimed to have the benefit of their contract. Their contract is contained in the rules; and under those rules they were entitled to redeem their securities and be clear of all further liability. They claimed to exercise this right notwithstanding the liquidation.

Cookson, Q.C., and *MacClymont*, (with them *C. E. Allan*), for the respondents:—

No doubt the Court below made an error of fact in holding that the advanced members in *Brownlie's Case* (1) could not participate in profits, but that case does not govern the present one. There is a cardinal distinction between the rules involved in the two cases. By the rules here, payment of instalments did not go pro tanto to discharge the debt under the bond; that debt (rule 27) was not to be discharged until the borrowing member renounced his shares—which after the 13th of May, 1882, he could not fairly do—or until the two sums are equal; whereas in *Brownlie's Case* (1) every payment went to discharge the sum advanced.

There are here two distinct contracts between the parties, namely, the rules and the personal bond in security; the one dealing with instalments on shares and the other dealing with repayment of the loan. A borrowing member pays full interest on the loan, and continues at the same time to pay instalments on his shares. In *Brownlie's Case* (1) the directors gave the advanced member a back-letter stating that the sum mentioned in the bond was an advance from the society as the amount of shares held. That identified and bound up together as one contract the shares and the loan. Here there was no back-letter, and the respondents' contention was that the appellants must pay up the full sum mentioned in the bond.

(1) 8 App. Cas. 235; 10 Court Sess. Cas. 4th Series (H.L.) 19.

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[Lord Herschell, L.C.:—The bond is not to be enforced until the borrowing member is in arrear with his instalments.]

Again, this society was constituted under 6 & 7 Will. 4, c. 32, and not under the Act of 1874, sect. 14 of which limited the amount of liability to the amount represented by the shares. That section was to some extent relied upon in *Brownlie's Case* (1). Then as to the so-called profits; they were not to be divided until withdrawal, and they now turn out to have been illusory. The appellants ought not to have credit for them.

Time having been taken, judgment was delivered as follows:—

Lord Herschell, L.C.:—

The question in the present case is whether the appellants, who are borrowing or advanced members of the respondent society, are entitled to redeem their securities and have their bonds discharged in terms of the rules of the society, or are bound to remain members and bear a share of the losses sustained by the society. The Court of Session held that they were liable to bear a share of the losses of the society in proportion to the sums standing at their credit on their shares.

The society was established in 1868 under the Building Societies Act, 6 & 7 Will. 4, c. 32. It was a building society constituted in the manner and for the purposes contemplated by that Act, and it had, according to its constitution, what are known as advanced and unadvanced members. All advances were to be made on the security of heritable property to the satisfaction of the directors, and to be made to members only. Provision is made, by rule 12, for non-borrowing members withdrawing from the society, and, under rule 13, for their receiving payment on the completion of their shares. Provision is also made for borrowing members redeeming their property given in security to the society, under rule 27.

The society carried on business and for some years realized profits, which profits were dealt with in the manner provided for by rule 28 of the society, to which I shall hereafter call attention, a certain portion of the profits, after setting aside a sum as

(1) 8 App. Cas. 235; 10 Court Sess. Cas. 4th Series (H.L.) 19.

a guarantee fund, being carried to the credit of each member of the society. The society, after proceeding prosperously for some years, sustained considerable losses, which absorbed the guarantee or reserve fund, and left a loss still unprovided for. In the year 1882, or prior to that year, that condition of things having been discovered by the directors, the society ceased, on the 13th of May, 1882, to carry on business, and existed only for the purpose of settling the rights of its members. The society had no liabilities to meet except its liabilities to its own members. But although the society was found to be in that condition in 1882, and ceased carrying on business on the 13th of May of that year, no petition for winding up the society was filed until the 9th of July, 1884, on which petition, a few days later, a winding-up order was made.

Under these circumstances a special case was stated for the purpose of determining whether the rights claimed by the advanced or borrowing members were well founded. That special case was stated between the society and its liquidator of the first part (although I should imagine that the liquidator, who is now among the respondents, was added at a later stage, for the special case was agreed upon before the order for winding up was made), and certain of its members, representing, as it was supposed, different interests and different states of fact, of the other parts. The Court of Session, upon that special case, pronounced an interlocutor, some parts of which are appealed against; of other parts of the interlocutor no complaint is made, and your Lordships' House have not to deal with them at all. The main complaint is this, that the Court of Session held, as I have stated, that the borrowing or advanced members were not entitled merely to complete the payments necessary for repaying their advances, and then to cease to be members of the society, but that they were bound not only to complete the payments for the purpose of redeeming their properties, but also to remain members for the purpose of bearing a portion of the losses. The ground of this decision of the Court of Session is thus stated in the judgment of Lord Shand (1): "Under the rules of the present society the borrowing members (rule 28) are entitled to have a share of

(1) 12 Court Sess. Cas. 4th Series, at p. 1285.

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the profits divided equitably among their shares, that is, allocated to their shares in the same way as such profits are allocated and credited to the shares of non-borrowing members: and that being so, it clearly follows that the borrowing members must bear their share of the losses. As already noticed, the society's rules or contract do not contemplate losses. It is a settled rule or principle of law, however, that an agreement to share profits, nothing being said about losses, primâ facie means an agreement to share losses, and that in the same ratio or proportion as the parties respectively have fixed with reference to the division of profits, unless there be some stipulation to a contrary effect. We are, therefore, of opinion that borrowing members who were still indebted to the society in any part of their advances on the 13th of May, 1882, when the society stopped, are liable to bear a share of the losses sustained by the society in proportion to the sums standing at their credit respectively on their shares at the 11th of April, 1882."

Now, my Lords, the view there expressed appears to me to be in direct conflict with the judgment of your Lordships' House in the case of *Brownlie* v. *Russell* (1), which was also the case of a building society very similar to the present. The very same argument was there addressed to your Lordships' House in favour of the advanced members being under an obligation to remain members for the purpose of bearing a portion of the losses; but in delivering his opinion in that case Lord Selborne thus expressed himself: "This is not a joint stock company; still less is it a common law partnership; but it is a society of a special kind, formed and regulated under particular Acts of Parliament for special purposes. A fallacy, which has pervaded much of the argument that has been offered to your Lordships in support of the appeal, is that, because the members of this society are associated together for a common purpose, therefore there must in equity and in reason, and by implication from their contract, although not in terms expressed, be a right on the part of some of the members to hold all the others liable in contribution to them for any loss which in the actual state of things they may suffer. It appears to me that such a result cannot be arrived at

(1) 8 App. Cas. at p. 248; 10 Court Sess. Cas. 4th Series (H.L.), at p. 20.

by presumptions or inferences from the law relating to companies of a different kind, but that we must look at this particular contract." And again Lord Bramwell, in his judgment, thus expresses himself (1): "It is sought to qualify the rule in this way. True, you have paid instalments which would satisfy the claim of the society upon you to the extent of their amount with interest upon them under that rule, were it not that the society has sustained losses; and the instalments which you have so paid must be taken to be attributable in part to those losses, and consequently you have not in reality and in substance paid so many instalments as you have nominally. Now that I understand to be the contention of the appellants. What is there in the rules to justify it? There is not one word in the rules about losses being borne either by the advanced or unadvanced members; and the only reason that can be given why the advanced members or anybody else should bear the losses is that they are to have profits if there were any. So they will undoubtedly; but it does not follow from that that they are to bear losses. It might have been a reasonable stipulation to put in if they had thought of it; but either they did not think of it, or if they did think of it they did not consider that it was reasonable to put it in, and we cannot put it in upon some speculation that if they had thought of it they would have put it in."

My Lords, that appears to me to shew that the ground upon which the Court of Session proceeded cannot be supported, inasmuch as your Lordships' House has decided that such a ground is not well founded. The Court of Session sought to distinguish the case now under consideration from *Brownlie's Case* (2) in this way, they said: "These cases," speaking of *Brownlie's Case* (2) and another case, *Scottish Property Investment Company* v. *Boyd* (3), "are to be distinguished from the present in this material respect, that the borrowing members in both cases were simply debtors to the society in the sums borrowed, and had no right, and were not entitled, to receive any share of the profits (4)."

(1) 8 App. Cas. at p. 260; 10 Court Sess. Cas. 4th Series (H.L.), at p. 27.

(2) 8 App. Cas. 235; 10 Court Sess. Cas. 4th Series (H.L.) 19.

(3) 12 Court Sess. Cas. 4th Series, 127.

(4) Ibid. at p. 1285.

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Now the answer to that suggested distinction is that it is not well founded in point of fact. There was precisely the same right to share in profits in *Brownlie's Case* (1) as there is in the present case, and it was frankly admitted by the learned counsel who argued this case on behalf of the respondents that they could not support the distinction which the Court of Session had made between *Brownlie's Case* (1) and the case now before your Lordships. But it was open to them no doubt to support the judgment of the Court below, if they could, upon some other grounds than that upon which the case was rested by the judgment of the learned Judges who decided it. And this they have attempted to do. They have argued, as I understand, that there are three distinctions between the present case and *Brownlie's Case* (1) which are sufficient to differentiate it and to shew that the judgment ought to be different.

First they say that the building society in *Brownlie's Case* (1) had been registered under the statute of 1874, and was subject to its provisions, and that Lord Selborne placed reliance in that case upon the provision of sect. 14 in the Act of 1874, that "the liability of any member of any society under this Act in respect of any share upon which no advance has been made shall be limited to the amount actually paid or in arrear on such share." No doubt it is true that distinction does exist; but I think that although the fact of that provision existing in the Act of 1874 was alluded to by Lord Selborne, it is impossible to read his judgment without seeing that it would have been precisely the same if the society had been registered only under the statute of William IV.

Next it is said that in *Brownlie's Case* (1), at the time when the securities and a bond with a condition for repayment of the advance made to him were given by the member to the society, a back letter was given by the directors which provided that, notwithstanding that the bond and disposition in security is in the usual terms, "it is nevertheless understood that the same shall not be enforced by the directors and manager of the said society as long as the said James Russell shall continue the regular payment of the instalments, interest, and other sums to

(1) 8 App. Cas. 235; 10 Court Sess. Cas. 4th Series (H.L.) 19.

become due upon his said shares in terms of the rules of the said society." It is perfectly true that in the present case there is no such back-letter; but I cannot see that this makes the slightest difference in the position of the parties. It was, I think, substantially admitted by Mr. Cookson, in his argument on behalf of the respondents, that although the condition of the bond was in this case absolute, and there was no back-letter, yet it would not have been open to the society, so long as the member continued to pay in accordance with the rules of the society, to enforce payment of the bond any more than if there had been such a back-letter. I think that distinction, therefore, also fails.

But then it is said (and this no doubt is the point with most substance in it) that the matter must be determined after all by the rules of the society, and that the rules of this society differ from the rules which were the basis of the decision in *Brownlie's Case* (1). Now the rule in *Brownlie's Case* (1) with regard to a member withdrawing was the 12th rule, which provided that "it shall be lawful at all times for a member who has obtained an advance to withdraw from the society upon giving the manager one month's notice in writing and paying up the whole of his debt, interests, and penalties, after deducting the amount of the monthly instalments paid upon his shares, with interest thereon calculated at the rates referred to in rule 9." It is said, first, that in that case the provision was that there was to be deducted the amount of monthly instalments "paid upon his shares," and that this shewed that the payments which were made from time to time by the borrowing member upon his shares were payments made in repayment of the advance made to him; and other expressions in the rules are relied upon for the purpose of establishing that fact. Then it is said that in the present case the payments made by the member as member in respect of his shares are not to be regarded as repayments of his advance—that the loan was, under the rules of this society, to be treated as an entirely independent transaction, at all events down to the moment of the full amount having been paid, and that on the one hand he received the loan and made the payments of interest upon that loan, and on the other hand he made payments quite

(1) 8 App. Cas. 235; 10 Court Sess. Cas. 4th Series (H.L.) 19.

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independently upon his shares as a member of the society, and that he was not entitled to claim when the society was in difficulties, and the winding-up came about, that the payments which he had made as a member upon his shares were to be treated in any way as payments pro tanto in discharge of the loan.

Now that renders necessary some examination of the rules of the society. I am quite unable to concur in the view thus contended for. I think that, as was pointed out by the Solicitor-General, the Building Societies Act itself, without reference even to the rules, indicates the character of these advances and what is the position of an advanced member, and that in truth his position is that he receives his share in advance, making repayments, whilst a non-advanced member is to receive his share ultimately and in the end. I may refer to the description of advanced and non-advanced members which is given by Lord Watson, and I think quite accurately, in his judgment in *Brownlie's Case* (1). But when these rules are looked at, it appears to me that this is undistinguishable from *Brownlie's Case*. Rule 16 provides that "any member who has been granted an advance may with the consent of the directors transfer his or her right and interest therein to any other person, along with the shares representing the same." What could shew more clearly than that the connection between the shares and the advance, and that the advance was an advance on the shares, and that the shares represented the advance?

In rule 26 the same provision is found: "Any member who has received an advance may transfer his or her right and interest in the same to any other person, along with the shares representing the same;" and then the purchaser is to "pay on entry a transfer fee of two shillings and sixpence for each share represented by the property so transferred."

Then when we come to rule 27, which is the most important rule that we have to deal with, we find it there provided that "Any member who has given any property in security to the society may, on giving three months' notice prior to the term of Martinmas or Whitsunday in any year, redeem the same by

(1) 8 App. Cas. at pp. 255, 256; 10 Court Sess. Cas. 4th Series (H.L.), at p. 25.

renouncing the shares representing the advance made thereon and paying the amount of said advance under deduction of the instalments paid in respect of the same." Now what are "the instalments paid in respect of the same"? These words mean, and it seems to me can only mean, the payments which have been made from time to time by the member on his shares, they are treated by this rule as instalments paid by the member in respect of his advance.

There appears to me, therefore, to be no substantial distinction between the rules of this society and the rules of the society in *Brownlie's Case* (1), and I think, therefore, that the determination in *Brownlie's Case* (1) determines the present case also. In *Brownlie's Case* (1) it was held that after a winding-up an advanced member could not take advantage of the rule enabling him to withdraw, because his right to act under that rule ceased by reason of the order for winding up; but it was held that the winding-up order created a kind of compulsory withdrawal of all the members who were at that time advanced members of the society and compelled them to repay the amount which was still due upon their advances, but did not substantially alter their position or their rights or render them at all different from what they would have been if they had been withdrawing under the rules.

Now, my Lords, I proceed to the special points which are raised in the case of each of the appellants who have prosecuted this appeal before your Lordships; and I think it will be found, when the facts are examined, that this case is really a stronger case than the case of *Brownlie* v. *Russell* (1); inasmuch as in the present case it appears to me that the parties had strictly a right to withdraw under the rules of this society and had put themselves in a position to withdraw prior to any petition for winding up being presented to the Court.

The first appellant, Tosh, if he had continued to pay his instalments pursuant to the rules, would in June, 1883, have completed his payments, and the subscriptions with the share of the profits would have been equal to the amount of the advance. In such a case the third alternative in rule 27 provides that "when the subscriptions, with the share of profits, of any member who

(1) 8 App. Cas. 235; 10 Court Sess. Cas. 4th Series (H.L.) 19.

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has received an advance are equal to the amount of said advance, then the payments of said member in respect of said shares on which the advance has been made shall cease, and his connection with the society in respect of the same shall terminate. In the event of any property being redeemed or completed as aforesaid" (it would be a case of completion) "the deed granted in security thereof shall be duly discharged by a receipt."

Now upon the 6th of December, 1882, Tosh paid to the society the amount of £8 0*s.* 11*d.*, which was accepted by them and which covered all the payments that fell to be made by him under the rules down to the following June. If he had paid in the ordinary way by payments spread over the intervals down to the 3rd of June, 1883, he would have completed his payments in the very terms of the portion of rule 27 which I have just read. What was there to prevent his so completing his payments and receiving, by virtue of rule 27, all that the rule entitled him to receive in that event? There was no petition for winding up the society at that time. There was nothing that I can see to affect his rights. He had done precisely what the rule provided for, and I cannot in the least see why he was not entitled to the benefit which the rule in that case gave him. It is said that although the subscriptions with the share of the profits which had been credited to him from time to time and which stood to his credit, together with this £8, were equal to the amount of the advance, nevertheless the society having made losses subsequently you must deduct or take away profits which had been credited to him—that they were not really profits. I cannot concur in that view at all. They were profits—they are found by the case to have been profits really made and properly credited to the shareholder year by year, of which if at the close of any of those years he had chosen to retire he would have been entitled to take the benefit. Under those circumstances it appears to me that when the payment of £8 0*s.* 11*d.* was made, or, at all events, in June, 1883, the time by which it ought to have been made, Tosh ceased to be liable to make any further payments because his connection with the society in respect of his shares had terminated.

My Lords, the next case is that of Guthrie. On the 27th of April, 1882, Guthrie gave notice of his intention to withdraw

from the society as regards his shares which were not fully matured, that is to say, the forty in respect of which he had received advances. What was there to prevent his doing so under the first alternative of rule 27? I can see nothing. It is true that a few days before that the society had ceased to carry on any fresh business; but it is not suggested that there were any outside creditors of this society at all—the only question which arises is as to the rights of the members inter se. What was there on the 27th of April, 1882, to prevent Guthrie giving his notice and getting his property redeemed in the very terms of rule 27? I can see nothing. Rule 27 provides that a member wishing to withdraw must give "three months' notice prior to the term of Martinmas or Whitsunday in any year." The notice, therefore, was too late of course for Whitsunday, 1882, and I think that the right to redeem only arose at Martinmas, 1882, and that the account must be taken upon that basis.

I turn now to the remaining case, the case of Finlay. Finlay gave notice to withdraw on the 16th of May, 1882. I can see no distinction between his case and that of Guthrie, and I think that he too was entitled to redeem, in terms of the first part of rule 27, at Martinmas, 1882.

That disposes of all the questions raised in this case with the exception of a point which was indeed raised by the case, but was abandoned by the Solicitor-General in the course of his opening on behalf of the appellants, namely, the question whether Finlay was entitled to continue the payments of his subscriptions under the rules notwithstanding the winding-up and to have the benefit of a share of the profits, he having ceased to be a member, under the latter part of rule 27. That point having been abandoned and, I think, wisely abandoned, it is unnecessary to say any thing more upon it. [His Lordship then moved the order given below, p. 508.]

LORD BLACKBURN:—

A special case was stated in the Court of Session, which expressly states that there were no outside creditors. I only mention that to shew that no question arises here, any more than

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it did in *Brownlie's Case* (1), as to what might be the effect with regard to outside creditors, as I may call them, of the concern. That special case, as stated, asked eight or nine questions of the Court of Session, as to three of which the answers in the interlocutor have been appealed from. The appeal is confined to those three queries, and we have to see whether the interlocutor was right as to the answers to them.

Now the ground upon which Lord Shand, who delivered the opinion of the Court of Session below, puts the matter is this, that where according to his reasoning (I am not pretending to quote his words) a party is entitled to get profits, there on the principle "qui sentit commodum, sentire debet et onus," he ought to share the loss, and that that applies in such a case as this. Against that there was the decision in *Brownlie's Case* (1), which Lord Shand held was not applicable to the present case, because, as he erroneously supposed, in *Brownlie's Case* (1) the decision in this House went upon the ground that Russell had never got any stipulation for profits at all. That was a mistake; and when the case of Brownlie is looked at it is seen that it was expressly said that the question was not to be decided on the general maxim that he who shares the profit ought to bear a share of the loss, but depended upon what was the effect of the contract contained in all the rules of such a society as this. Now in *Brownlie's Case* (1) it was held that the contract was such that the party was entitled, not to withdraw from being a member, because the winding-up prevented that, but to redeem in the manner which the contract between the parties, evidenced by the rules, shewed.

That being so, the main ground upon which Lord Shand and the Court of Session went is, I think, not tenable. I do not mean to say that if it were res integra there might not be a great deal to be said in support of the opinion which he delivered, but it was distinctly decided by the House of Lords that that principle did not apply to the case of such a society as this, and that being so we must consider that as decided, and as a fixed matter no longer open to be examined into at all. It was, however, said in

(1) 8 App. Cas. 235; 10 Court Sess. Cas. 4th Series (H.L.) 19.

the argument that though that was so, yet the actual contract made in this case was not the same as in *Brownlie's Case* (1) because the rules were not identical. There was also a point made that the Acts were different, but I think that I need not mention that, because it has been quite answered by what has been said by the noble and learned Lord, the Lord Chancellor, in his judgment just delivered. Then there is the fact, no doubt, that the bond which was delivered in *Brownlie's Case* (1) had a back-letter attached to it, but I think that that makes no real difference. The advance which was made, whether under a bond according to the English form of doing it, without any back-letter, or under a bond with a back-letter, was equally an advance made under the terms of the contract, whatever it was, arising from the rules.

Then it is said that the rules in this particular case are not identical with those in *Brownlie's Case* (1), and I think that they are not identical, and if any of them did materially differ it might make a difference in the contract which we are to apply to the particular case. All that your Lordships have now to deal with, and all that I have to deal with are the three cases which are brought before us. I have not thought it necessary to look at the others, and when we look at those three cases we find that there is really no difference in the effect of the contract which arose from the rules.

Tosh's is the first case. I need not go through it—the Lord Chancellor stated the effect of what had been done, and I quite agree that the answer as respects Tosh's case, called the sixth party in the Court below, was a mistaken answer, and that the interlocutor ought to be varied in the manner which the Lord Chancellor has read. Then comes Guthrie's case, who was the seventh party as he is called in the special case. There is a part only of the interlocutor as regards him which is appealed against, and I agree that that should be altered in the manner which the Lord Chancellor proposes. Then comes the last case, namely, that relating to Finlay, which is the subject of the eighth query. A part of what was there appealed against has been given up. The whole of what was there appealed against

(1) 8 App. Cas. 235; 10 Court Sess. Cas. 4th Series (H.L.) 19.

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has not to be altered, but a part has to be altered, and accordingly I think that the interlocutor ought to be varied in the way proposed.

Lord FitzGerald :—

I concur in the reasoning of the Lord Chancellor and in the amendments of the interlocutor which he proposes. I am the only member of the House now present who took part in the decision of *Brownlie's Case* (1). That case was not disposed of immediately after the hearing of the argument, there was some novelty in it, and time was taken for consideration, and even more than ordinary care was applied to it. From the beginning of the argument in the present appeal I have thought that it was governed in every part by the decision of your Lordships' House in *Browlie* v. *Russell* (1).

Sir *H. Davey*, S.G. :—The appeal is by certain persons who represent different classes, for the purpose of obtaining the decision of the House and enabling the liquidator to wind up the society; in these circumstances the ordinary practice as to costs is that the costs of all parties will be paid out of the estate. That was the order made in the *Blackburn Case* (2) where there was nothing in the appeal or special case providing for it. I do not ask for costs personally against the respondents, but I ask that the liquidator may be directed to pay the costs out of the estates of the society, which are ample for the purpose.

Lord Herschell, L.C. :—Then the order will be that the costs of both parties be paid by the liquidator out of the society's estates.

McClymont :—The effect of such an order would be to make us practically as respondents bear the costs of all parties.

Lord Herschell, L.C :—Well, that would be right.

Interlocutor appealed from varied by omitting the answer to query 5, *and substituting therefor*

(1) 8 App. Cas. 235; 10 Court Sess. Cas. 4th Series (H.L.), 19.

(2) *Walton v. Edge*, 10 App. Cas. at p. 44.

the following words:—"In answer to query 5, *find and declare that the sixth party is entitled to cease being a member of the society, and to have his bond and disposition in security discharged in terms of rule* 27, *without any further payment, and that he is not liable to bear a share of the loss sustained by the society in proportion to the sum standing at his credit on his shares at* 11*th April*, 1882," *by omitting so much of the answer to query* 6 *as is appealed against, and substituting therefor the following words:—"So far as regards the other shares held by him in respect of which the advances mentioned in art.* 24 *of the case were made he is entitled in terms of art.* 27 *to a discharge of his bonds, and to cease to be a member of the society, upon payment of the difference between the amount of his bonds with interest thereon down to Martinmas,* 1882, *on the one hand, and on the other hand the amount of the instalments paid in respect of the shares with interest on the amount of the instalments from time to time paid at* 5 *per cent. to Martinmas,* 1882, *and that he does not fall to bear a share of the losses of the society in proportion to the sum standing to his credit on his shares;" and by omitting the answer to the eighth query, and substituting the following:—"In answer to the eighth query, find and declare that the ninth party is entitled to have his bond discharged, and to cease to be a member of the society, in terms of art.* 27, *upon payment of the difference between the amount of his bond with interest thereon down to Martinmas,* 1882, *on the one hand, and on the other hand the amount of the instalments paid in respect of his shares with interest on the amount of the instalments from time to time paid at five per cent. to Martinmas,* 1882, *and that he does not fall to bear a share of the losses of the society in*

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proportion to the sum standing to his credit on his shares, but that he is not entitled to complete his shares by paying up the instalments which remain due thereon, getting credit for all profits which have been allocated upon his shares, and upon such completion to have his bond discharged and cease to be a member."

The costs of all parties to this appeal to be paid out of the estate of the respondent society.

Lords' Journals, 30th July, 1886.

Agents for appellants: *Davidson, Burch & Co., for Mackenzie & Black, W.S., Edinburgh.*

Agents for respondents: *Lindo & Co., for David Turnbull, W.S., Edinburgh.*

[HOUSE OF LORDS.]

JOHN JESSOP MILNES . . . . . APPELLANT;

AND

THE MAYOR, ALDERMEN AND BURGESSES OF THE BOROUGH OF HUDDERSFIELD . . . . . RESPONDENTS.

H. L. (E.) 1886 *July* 16.

Local Government Acts—Water, Supply of pure and wholesome—Water pure and wholesome in Mains, but contaminated in Consumer's Pipes—Waterworks Clauses Act 1847 (10 & 11 *Vict. c.* 17) *s.* 35—*Waterworks Clauses Act* 1863 (26 & 27 *Vict. c.* 93) *s.* 19.

Undertakers for the supply of water to Huddersfield were bound on certain conditions to cause pipes to be laid down and water to be brought to every part of the town, and by s. 35 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), "to provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town who should be entitled to demand a supply and should be willing to pay water-rate for the same." By their special Act the undertakers were empowered to make bye-laws with regard to the consumers' pipes. The bye-laws made under this power prescribed lead as the necessary material for every consumer's pipe, "not being of cast iron." The undertakers in accordance with their usual practice at the consumer's request and cost laid down communication and service pipes of lead between their mains and the plaintiff's house.

The effect of the bye-laws and of s. 19 of the Waterworks Clauses Act 1863 (26 & 27 Vict. c. 93) was that though the lead pipes might be the property of the plaintiff they were entirely under the control of the undertakers, and could not without their consent be interfered with by the plaintiff. Water was supplied by them to the plaintiff which was pure and wholesome in the mains but was of such quality that in its passage from the mains to the plaintiff's house it became contaminated by the lead and poisoned the plaintiff. The plaintiff having brought an action against the undertakers for damages for the injury to his health alleged a breach of the statutory obligation:—

Held, that the obligation imposed by s. 35 was to supply water which was pure and wholesome in the mains, and by LORDS BLACKBURN, BRAMWELL, FITZGERALD, HALSBURY and ASHBOURNE (The EARL OF SELBORNE and LORD WATSON dissenting), that having complied with that obligation the undertakers were not (negligence being out of the case) liable to the plaintiff in this action.

Held, by THE EARL OF SELBORNE and LORD WATSON, that the undertakers were liable, on the ground that the water contained some special

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and peculiar solvent of lead, which made it poisonous after passing through the leaden pipes, although it would have been harmless if it could have been drunk direct from the mains.

The decision of the Court of Appeal (12 Q. B. D. 443) affirmed.

APPEAL from an order of the Court of Appeal (1).

The respondents are the Urban Sanitary Authority of Huddersfield, and were by the Huddersfield Water Act 1869 (32 & 33 Vict. c. cx.) empowered to supply water within a certain district. Sect. 2 of that Act incorporated several enactments (so far as the same were applicable for the purposes and were not inconsistent with the provisions of the Act) and (inter alia) the Waterworks Clauses Acts 1847 and 1863, except the provisions with respect to the amount of profit to be received by the undertakers when the waterworks were carried on for their benefit. The following provisions in the Act of 1869 were referred to during the argument:—

"66. For preventing waste, misuse, undue consumption, or contamination of the water of the corporation, the following provisions shall have effect; namely, (1.) The corporation may from time to time make such bye-laws and regulations as they think necessary for the objects aforesaid to be observed by persons supplied with water: (2.) By any such regulations the corporation may direct the use, and prescribe the size, nature, strength, and materials, and the mode of arrangement, alteration, and repair of pipes, valves, cocks, cisterns, baths, soil-pans, water-closets, and other apparatus or receptacles to be used by such persons for conveying, delivering, and receiving water, and may interdict any arrangement, and the use of any pipe, valve, cock, cistern, bath, soil-pan, water-closet, or other apparatus or receptacle in their judgment likely to occasion waste, nuisance, undue consumption, or contamination of water: (3.) The corporation shall not be bound under any agreement or otherwise to supply, or to continue to supply, water to any person unless such regulations as are for the time being in force are duly observed by him: (4.) In case of the failure of any person to observe such regulations as are for the time being in force, the corporation may, if they think fit, after two hours' notice in writing, enter, and by or under the direction of their authorized officer, repair,

(1) 12 Q. B. D. 443.

replace, or alter any pipe, valve, cock, cistern, bath, soil-pan, water-closet, or other apparatus or receptacle belonging to or used by any person supplied by them, and the power of entry given by s. 15 of the Waterworks Clauses Act, 1863, and the provisions of that section relative thereto, shall extend and apply to entry for the purpose of such repair, replacement, or alteration, and the expense of every such repair, replacement, or alteration shall be repaid to the corporation by the person on whose credit the water is supplied, and may be recovered by them as damages, for recovery whereof no special provision is made: . . . . "

"70. The corporation may, if requested by any person supplied by them with water, furnish to him and from time to time repair or alter any such pipes, valves, cocks, cisterns, baths, soil-pans, water-closets, apparatus, and receptacles as are required or permitted by their regulations, and may provide all materials and do all work necessary or proper in that behalf.

"71. Notwithstanding anything in this Act or in any Act incorporated wholly or in part with this Act, the corporation shall not be bound to lay down service pipes or other works from their mains into the houses adjoining, or near thereto, for the supply of such houses with water on terms of an annual rent for such pipes and works being charged or paid, but they may do so by agreement, or may require the full costs of such service pipes and works to be paid in the first instance."

Under this Act the corporation made bye-laws (1873), for preventing waste, misuse, undue consumption or contamination of the water supplied by the corporation, of which the following were referred to:—

"2. The term "consumers' pipe" means any pipe not being the property of the corporation, used or intended to be used for the conveyance or distribution of water for the time being supplied by the corporation.

"4. No supply of water will be granted to or obtainable by any person, except upon an application in writing, which must be signed by the party intending to be charged therewith, or his authorized agent, and delivered to the waterworks manager or office clerk, at the waterworks office, in Spring Street. Terms of application may be obtained at such office.

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"5. The service pipe, brass ferrule, and works for taking the supply of water from the main pipe of the corporation into the house, building or premises intended to be supplied, and the stop-tap and works for controlling such supply, shall be provided and executed by the corporation, but at the expense in all respects of the applicant, except as to the stop-tap which will be provided by and at the expense of the corporation. The charges for such connecting pipes and works shall be from time to time fixed by the corporation, and the estimated amount thereof shall, if required, be paid in advance to the corporation before the corporation be called upon to commence or permit to be commenced any of such works.

"6. The connecting pipes and works from the street main to the consumer's premises shall at all times be under the control and management of the corporation, and shall be deemed to belong to them, and they shall have free access thereto at all times, and especially to work the stop-tap, and such connecting works with the street mains shall not be removed or in any way interfered with by the consumer without the consent of the corporation first obtained, but the corporation shall have the right to disconnect, discontinue, and remove the same when they deem it just and proper to do so.

"7. No person except the authorized officers and servants of the corporation shall on any account tap or make a connection with the mains or pipes of the corporation or interfere with any valve or except in case of fire with any fire plug.

"8. All lead pipes put in by or for the use of consumers must be new and all curves in the consumers' pipes must be easy as possible so as to keep the pipe of even and uniform bore at the bend.

"9. No pipe communication with the corporation main shall exceed half an inch bore except with the consent of the corporation expressed in writing under the hand of their waterworks manager for the time being.

"10. Where the internal diameter of any consumer's pipe is allowed to exceed one inch the corporation may require the same to be of cast iron.

"11. Every consumer's pipe not being of cast iron and not

being otherwise authorized by these regulations shall be of lead and of at least the following weights per lineal yard viz :— . . . .

"12. Every joint made in a consumer's pipe being of lead shall be of the kind known as a solder plumbing or wiped joint."

"42. No pipe or tap shall be attached to the waterworks of the corporation, or to any pipe or apparatus connected therewith, nor shall any addition or alteration be made to or in any existing pipe or apparatus without due notice having been previously given at the waterworks office of the corporation, in Spring Street, nor until such pipe, tap, or apparatus shall have been inspected by the waterworks manager or inspector of the corporation, and found to be in accordance with these regulations, and the charge or additional charge (if any) payable in respect of such connection, extension or alteration shall have been determined and agreed upon between the corporation and the consumer.

"48. The water supplied by the corporation shall not be used for other than domestic purposes, except under and by virtue of a special contract in writing to that effect, to be entered upon between the consumer and the waterworks manager for the corporation, and such special contract shall specify the terms on which and the uses or purposes for which the water may be used and it shall not be used for any other purposes than those specified."

In 1874 the defendants, upon the written request of the plaintiff's lessor and at the cost partly of the plaintiff and partly of his lessor, laid lead pipes from their mains to the plaintiff's house in Huddersfield, and supplied him with water. Lead pipes were the ordinary means of connecting the mains with the houses in the defendants' district. In 1879 for the first time the defendants, having discovered that some of the water supplied by them was after passing through lead injurious to health, employed analysts to examine the water. The result of the examination was that the defendants had notice that there was in the water from Blackmoorfoot reservoir a free acid which might probably make the water after passing through lead dangerous to health. The defendants took no precautions to avoid this effect, but supplied the water as before, and, in consequence, several persons were attacked with illness. Among them was the plaintiff, who

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became seriously ill in 1881. For the injuries thus sustained the plaintiff brought this action, alleging in his claim that he was under the above-mentioned statutes entitled to a supply of pure and wholesome water sufficient for his domestic use, and that the water supplied by the defendants was impure and unwholesome. The action was tried at Leeds before Mathew J. in 1882, when after evidence of the above facts the jury assessed the damages at £2000, subject to the question of the defendants' liability, reserved for further consideration. Mathew J. gave judgment for the defendants (1), and this judgment was affirmed by the Court of Appeal (Lord Coleridge C.J., Brett M.R. and Bowen L.J. (2)). From this decision the plaintiff now appealed.

The case was twice argued; first on February 18, 19, 22, 24, before the Earl of Selborne and Lords Watson and FitzGerald, by *Lumley Smith* Q.C. and *Cyril Dodd* (*R. W. Harper* with them) for the appellant, and Sir *Richard Webster* Q.C. and *Forbes* Q.C. (*R. Vaughan Williams* with them) for the respondents; secondly, on May 25, 27 before the Earl of Selborne and Lords Blackburn, Watson, Bramwell, FitzGerald, Halsbury and Ashbourne.

May 25, 27. *Lumley Smith* Q.C. (*Cyril Dodd*, and *R. W. Harper*, with him) for the appellant:—

It is admitted that the plaintiff was poisoned by the water he drank, that water having become hurtful by the lead absorbed while it was passing through the communication-pipes between the defendants' mains and the plaintiff's house. There being no claim for negligence, the case is based on statutory duty. The obligation on the defendants is, by sect. 35 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), "to provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town who," &c. The defendants contend that "pipes" means only "mains." The plaintiff contends that "pipes" includes service and communication pipes. By sect. 43 the defendants are not absolutely bound to supply water; only if they can supply pure and wholesome water. The other material clauses of that Act are sects. 28, 44, 48, and 53. Sect. 48 is clearly

(1) 10 Q. B. D. 124. (2) 12 Q. B. D. 443.

overridden by the Huddersfield Water Act of 1869 (32 & 33 Vict. c. cx.) s. 66, which entitled the defendants to prescribe the material to be used for service pipes by persons supplied by water.

The defendants were bound to supply water fit for the purpose mentioned in the statute. This the evidence shews they did not do. They supplied water not fit to pass through the lead service pipes. The effect of the Huddersfield Act and of the bye-laws made thereunder is that the service-pipes were to all intents and purposes under the control of the defendants. They were, in fact, laid down by them, and the plaintiff had no control over the service-pipes. The defendants are responsible, having delivered through the leaden pipes, or having sold to be received through the leaden pipes, water which was impure and unwholesome.

Sir *R. Webster* Q.C. (*Forbes* Q.C. and *R. Vaughan Williams*, with him) for the respondents:—

The first question is, What is the statutory duty cast on the defendants? The second is, On whom is the responsibility for allowing deterioration in the service-pipes? There is no contract that the water shall be under all circumstances pure and wholesome; nor any statutory obligation to that effect. Suppose the service-pipe was worn out and let the water escape and damage the house, the defendants would not be liable. The risk of contamination in the service-pipes is not one against which there is any guarantee, statutory or otherwise, nor any liability apart from negligence. Suppose some malicious person throws poisonous matter into the reservoir, and so poisonous water is delivered into the consumers' pipes, the defendants would be liable if there were an absolute obligation to supply under all circumstances pure and wholesome water. This shews that the obligation cannot be absolute. "Shall provide and keep," means "shall use all reasonable means to provide and keep." Moreover, the water being pure and wholesome in general, the defendants are not liable merely because it has disagreed with the plaintiff and perhaps a few other individuals. Anything done by the undertakers in laying down service-pipes is done as agents for the consumer, and does not enlarge the obligation, though of course they might be liable for negligence.

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The view submitted as to the real meaning of sect. 35 of the Waterworks Clauses Act 1847, is confirmed by an examination of the whole Act, and especially sects. 44–53. As to the Waterworks Clauses Act 1863 (26 & 27 Vict. c. 93), s. 16 points to outside contamination. There is nothing in the private Act to increase the obligation on the undertakers. The bye-laws do not prescribe lead, and it cannot extend the obligation that the undertakers at the consumer's request supplied lead pipes.

Further, no action will lie for breach of such a statutory duty: *Atkinson* v. *Newcastle &c. Waterworks Co.* (1); *Hammond* v. *Vestry of St. Pancras* (2).

In the present case, the consumer's only remedy is for a penalty under sects. 36–43 of the Waterworks Clauses Act 1847 for not providing a sufficient supply of water.

Lumley Smith Q.C. in reply:—

The general rule is, that if there is a breach of a statutory duty resulting in loss to an individual, an action lies—see *Couch* v. *Steel* (3) and the authorities there cited; unless there is something in the purview of the Act which negatives the idea: *Borough of Bathurst* v. *Macpherson* (4). The decision in *Atkinson* v. *Newcastle Waterworks Company* (1) turned upon the penalty clause and the special legislation. The penalty clause in the present case applies only to not providing a sufficient supply of water, and not to the supplying impure and unwholesome water. Failing anything to shew a contrary intention the legislature makes public bodies liable to the same obligations as private persons: *Mersey Docks Trustees* v. *Gibbs* (5); per Blackburn J.: *Lax* v. *Corporation of Darlington* (6).

The House took time for consideration.

July 16. EARL OF SELBORNE:—

My Lords, after the first argument of this important and, to my mind, difficult case, I had formed an opinion different from

(1) 2 Ex. D. 441.
(2) Law Rep. 9 C. P. 316.
(3) 3 E. & B. 402.
(4) 4 App. Cas. 256, 268.
(5) Law Rep. 1 H. L. 93, 107, 110.
(6) 5 Ex. D. 28.

that which is I believe entertained by a majority of those who heard the second argument. But I thought it desirable that the case should be further argued before a greater number of your Lordships; and I am very glad that this has been done. Four very learned judges had concurred in the view taken by both the Courts below; and the questions raised might concern on the one hand, all consumers of water supplied in the usual way by public bodies to inhabitants of large towns, where lead pipes are used, and the water may be of a quality likely to take up lead, and on the other hand all the public bodies supplying such water. It is not often that it can be matter of satisfaction to a judge that a case should be determined against his opinion; but in the present case I should not have wished my opinion to prevail against so considerable a preponderance of judicial authority. I nevertheless think it my duty (especially as the subject is one which may deserve and receive attention from the legislature) to state the view which I have taken, and which (if it depended on my judgment) I should still take of this case; but I do not consider it necessary to do so in that detail, or with that particular examination of all the clauses of the Acts of Parliament and other documents, or of the state of the evidence, which might under other circumstances have been proper.

By the General Waterworks Clauses Acts and the special Act as to Huddersfield, the respondents, being undertakers for the supply of the town of Huddersfield with water, are bound (on certain conditions) to cause pipes to be laid down and water to be brought to every part of the town, and to provide and keep in the pipes to be laid down by them, (that is, as I agree, in their mains), "a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants," and to furnish to every inhabitant demanding it on the terms of the Act "a sufficient supply of water for his domestic purposes." For this they are to receive payment; and if their surveyor or officer of health reports any house within the borough to be without a proper supply of water they may compel the owner to take and pay for such a supply.

The cause of action stated in his pleadings by the appellant against the respondents was, that the water supplied to him was

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"impure and unwholesome," "contaminated with deleterious substances" (which in his particulars he explained to be "lead or some poisonous compounds of lead and acids which acted upon the surface of the lead pipes through which the water was conveyed to him"), and "unfit for drinking and other domestic uses," and that his health had suffered thereby. That his health did suffer, and that seriously, by lead poisoning through the use of the water supplied to him by the respondents from their Blackmoorfoot reservoir, was not contested; and the jury at the trial found £2000 as the proper amount of damages, if he was entitled to damages at all.

Some embarrassment has arisen out of the manner in which the questions of fact were withdrawn from the jury; but (except on one point which the plaintiff's counsel treated as immaterial, waiving his right to have the opinion of the jury taken upon it) it must have been the intention and understanding of both parties, that the Court, when deciding the questions of law, should also look at the whole evidence, in order to see upon what state of facts those questions arose. The only substantial difference, as it appears to me, between the witnesses for the plaintiff and those for the defendants, was as to the exact chemical cause of effects which were really not in dispute, and particularly as to the exact chemical operation of the sulphuric acid, which was proved beyond controversy to be present in the water as supplied by the defendants. The question treated as immaterial, and therefore withdrawn from the jury by the plaintiff's counsel, was this only; not, whether there was or was not present in the water supplied by the defendants some peculiar and special solvent of lead, but whether it was or was not of the particular nature and character deposed to by the plaintiffs' witnesses. It is perhaps to be regretted that the former question should not have been put to the jury, because there appears to be even among your Lordships some difference of opinion about it, and it was certainly a question not of law but of fact. I cannot for my part regard the plaintiff's counsel as having done anything at the trial at all equivalent to an admission that there was no special or peculiar solvent of lead in the water, as brought from the reservoir into the respondents' mains; and feeling obliged to

consider for myself what is the true result of the evidence on that point, I do not hesitate to say that I take it to be one of the facts of the case which were (to my mind without much, if any, controversy) made out at the trial. If there had been no mixture of any foreign or adventitious matter whatever in the water, making its effects upon lead different from those which would necessarily and always be produced by rain-water, or other quite pure soft water, the case would be different. I do not believe that, in that case, the plaintiff and others who suffered in like manner would have been poisoned. But there seems to me to be clear and, indeed, uncontradicted evidence, (1) that, although all soft waters do for a time take up some lead, they do not all take it up to an extent or in a manner which is noxious to health, in the way in which the water drunk by the plaintiff is proved to have been; (2) that they usually (and especially when they contain some proportion of sulphuric acid added to pure water) produce a protective coating in the interior of lead pipes, which in this case was not produced; (3) that in this case the quantity of lead taken up and held in solution went on continually increasing so as to become more and more dangerous, which would not have happened in the same way without the presence in the water of some peculiar and unusually powerful solvent of lead; and (4) that, although the persons proved to have actually suffered as the plaintiff did were but few out of a large population, (lead being what is called an "elective" poison, and not affecting all persons alike,) they were sufficient to prove the existence in the water of some special and increasingly noxious quality. Nor can I regard as unimportant the uncontradicted evidence of the report made to the respondents, some time before the plaintiff began to suffer, by their own public analyst, that the water supplied, under similar natural conditions, from another of their reservoirs, (Deerhill,) had in 1880 got into such a condition as to make its continued use dangerous, which was not yet (at that time) the case with the Blackmoorfoot reservoir; and that, in the analyst's opinion, the Blackmoorfoot water also would be liable eventually to get into the same condition, unless certain ochrey springs and coal-pit waters were kept out of it, which was not done. I have thought it necessary to state, at the outset,

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my view of these facts, because the questions in the case are two; the first one of law, what was the statutory obligation of the respondents, in respect of the supply of water to the inhabitants of Huddersfield? the second one of fact, whether the statutory obligation was duly performed?

Upon the question of law, I cannot for a moment doubt that the object with which the general and special Acts were all passed ought throughout to be borne in mind. That object was that the consumers should be supplied with water, a prime necessity of life, for drinking—not indeed the only purpose, but a primary one, which must be and which alone need be here regarded. To be fit for drinking the water must be wholesome and not poisonous to those who drink it. It is a paradox little short of absurdity to suppose that water not fulfilling that condition could be such as the legislature intended to be supplied.

Next, it appears plainly, from many provisions of the Acts, (even if it were not self-evident), that the legislature contemplated the introduction and supply of water into the houses of the consumers by the usual, and indeed necessary, means, that is, by mains bringing the water into the streets from the sources of supply, by communication pipes conducting it from those mains into the consumers' houses, and by service pipes carrying it to those places within each house from which it was ultimately to be drawn. The water to be drunk must pass through all those means of supply before it could practically reach any consumer; whatever could not so reach him without becoming poisonous could not safely be drunk, and would, therefore, not fulfil the primary objects for which the whole supply was required. Whatever else the legislature may have intended, it certainly did not intend the water to be drunk directly out of the undertakers' mains; and when the obligation was imposed upon them to keep in their mains "a supply of pure and wholesome water sufficient for the domestic use of all the inhabitants," and to give to every inhabitant demanding and paying for it "a sufficient supply of water for his domestic purposes," I cannot think it reasonable to understand this in any abstract unpractical sense irrelevant to the consumer, and independent of the proper means and necessary conditions of his consumption. If the legislature had

expressly required all communication and service pipes to be of lead, it is inconceivable to me that the fitness of the water for drinking while in the undertakers' mains (from which it never would or could be drunk) could have been held to satisfy the respondents' obligation, if it were unfit to pass through lead and to be afterwards drunk, by reason of the presence in it of a special solvent of lead; although that solvent might be absolutely inoperative and innoxious to any one who might drink the water before it came in contact with lead.

It is true that this is a case of statutory obligation, not properly of contract; although Lord Eldon and other great judges regarded Acts of Parliament of this class, giving powers to promoters or undertakers who solicit them, and who are to receive remuneration in money for what under those powers they supply, as parliamentary contracts with the public, or at least with that portion of the public which might be directly interested in them. But I fail to see why it should be less necessary or reasonable (unless the words of the statutes exclude it) to regard the fitness of the thing supplied for the purpose of the statutory obligation as an element of that obligation itself, than it is to do so when the obligation results properly from contract. I can, indeed, conceive a possible, though most improbable, case, in which the legislature might have absolved the undertakers from all responsibility for the quality of the water supplied by them; not only authorizing them (as here) to collect the springs within a certain area for the purposes of the supply, but requiring or authorizing them to supply those particular waters in their actual state and condition, as they might be collected in certain reservoirs, without any obligation either to reject, or to find the means of purifying them, if they should become contaminated with adventitious matter rendering them unfit for their intended purpose. In that case, however improvident such legislation might be, the consumer would have to take care of himself as best he could; the undertakers would have a statutory indemnity, whatever might happen. But it seems to me that there is no ground for so construing those Acts of Parliament with which we have here to deal.

Another case might have been possible; and, indeed, unless I

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misunderstand the opinions from which I differ, the learned Judges in the Court of Appeal, and some of your Lordships also, think that the present is really such a case. A clear line of separation might have been drawn between the works of the undertakers, beginning with their conduits and reservoirs, and ending in their mains; and everything else,—the choice of material for the communication and service pipes, and the whole system and means of supply from the mains to the consumer's premises,—might have been placed entirely within the power and under the control of the consumer, at his sole risk, and on his sole responsibility. In that case, I should have agreed, that if the water was pure and wholesome at the point where all the duties, powers and responsibilities of the undertakers terminated, the consumer, and not the undertakers, might be solely answerable for whatever might afterwards happen to it while passing through pipes constructed at his own option, and in his own way, of a material chosen by himself. But I cannot agree with those who think that your Lordships have to deal here with anything like that state of things; and the reason why you have not is obvious. It would be quite inconsistent with the interests of the undertakers, and would place in great hazard the profits of their undertaking, if their powers of interference and control were to terminate at the mains; the hypothesis is an unreal one, inconsistent with the nature and the indispensable conditions of such an undertaking. It is of very little importance, in my judgment, to this question, that the legal property in the communication and service pipes may be (as indeed I think it is) in the consumer, after he has paid for them, unless he was free to determine for himself of what material they should be made, and to exercise, both when they were laid down and afterwards, substantial control over them, independent of the undertakers; and this (as I read and understand the Acts and the bye-laws made by the respondents) he was not. Under the General Act of 1847 the communication pipes might, indeed, be laid down by the consumer; but they were to be of a strength and material approved by the undertakers, and to be laid down under the superintendence of their officers, with an appeal, in case of difference, to justices. Such restricted powers differ widely from

that freedom which may involve sole responsibility. By the 19th section of the Act of 1863 these restrictions were largely extended. Every consumer was prohibited, under penalties, from affixing, or causing or permitting to be affixed, any pipe or apparatus to a pipe belonging to the undertakers, or to a communication or service pipe belonging to the consumer, and from making any alteration in any such communication or service pipe, or in any apparatus connected therewith, "without the consent, in every such case, of the undertakers." And by the special Act for Huddersfield, absolute power was given to the respondents to make bye-laws, directing the use, and prescribing the size, nature, strength, and materials, and the mode of arrangement, alteration and repair, of (among other things) all the consumer's pipes. The respondents exercised that power by prescribing lead as the necessary material for every consumer's pipe, "not being of cast iron." That a practical option was given to the consumer to use cast iron for all his pipes does not appear to me to be the true effect of this bye-law, having regard to the immediately antecedent context; but on this I do not dwell, because the respondents, by another bye-law, took upon themselves (as under the 70th section of their special Act they certainly might, with the consumer's assent) the office of providing and executing, in all cases, the whole service pipes and works for the supply of water from the mains into the houses of the consumers; and they also reserved to themselves the sole and exclusive control and management over the "connecting pipes and works from the street main to the consumer's premises." All the leaden communication and service pipes were, in the present case (and as I collect from the evidence, in Huddersfield generally) laid down by the respondents themselves, under these bye-laws, pursuant to written applications founded upon them, which were signed by the consumers.

I cannot be persuaded, under these circumstances, that any such line has been drawn by the legislature between that part of the means of supply which ends in the mains belonging to the respondents, and that which is continued from those mains into the consumer's house by pipes of which the legal property is in the consumer, as to throw upon the consumer the sole responsi-

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bility for all contamination which may occur in those pipes, by reason of the action of anything contained in the water upon the material of which they are composed. I cannot be persuaded that the statutory obligation of the respondents is fulfilled, if they deliver from their mains into those pipes water containing foreign or adventitious matter (whatever may be its exact nature, or the exact chemical conditions under which it has such a noxious effect), which in passing through those pipes will cause the water to take up lead, and so become poisonous, in a way which otherwise would not have happened, although the water containing that matter might have been absolutely innoxious if it could have been drunk from the mains without passing through lead.

Taking this view, I should have arrived at a conclusion in the appellant's favour, not on the ground of negligence (as to which no question was open upon the pleadings), but on that of non-fulfilment of the statutory obligation. Not only was no question of negligence raised, but I think it right to say that I am unable to see how it could possibly have been raised (consistently with the views of the statutory obligation on which I understand the opinions from which I differ to be founded), even if the potency of the special solvent of lead contained in this water (continuing to be innoxious until brought into contact with lead) had increased and accumulated to such a degree as to poison the whole population of Huddersfield. This, happily (as lead is an "elective" poison, and as the respondents may be expected to use the best means in their power to counteract the mischief, whether legally obliged to do so or not, and I am not convinced that no such means are possible) is not likely to happen; but if it did happen, the logical result of the views from which I differ seems to me to be, that the legislature only would be to blame. Although I do not myself think so, I recognise, as I have already said, the weight of the authority opposed to my opinion, in accordance with which your Lordships' judgment will now settle the law.

LORD BLACKBURN:—

My Lords, this case was heard before the House consisting on that occasion of the Earl of Selborne, Lord Watson, and Lord

FitzGerald, and those noble and learned Lords, when considering the case, did not altogether agree in their views, and it was therefore directed that there should be a second argument. I have had the advantage, besides hearing the second argument, of being furnished with the opinions of the Earl of Selborne and Lord Watson, printed confidentially, and circulated whilst the case was under consideration after the former argument. Since the conclusion of this argument, I have read again these opinions with great care. I have come to the conclusion that the judgment of Mathew J., which has been affirmed by the Court of Appeal, ought to be affirmed. But I feel that it is a hard case that the appellant should, without any fault even imputed to him, suffer a damage so great, without redress. And I also feel that not only the inhabitants of Huddersfield, but also the inhabitants of many other districts who are supplied with water from such sources as produce what is commonly called "soft" water, may be in a similar position.

There was evidence which, I think, would have justified the conclusion that the quantity of lead which could be taken up by this water from so short a length of lead pipe as that which led from the mains to the tap which supplied the appellant with drinking water would not have produced any noxious effect on most people. The appellant's family, consisting of his wife and servants and six children, the oldest of whom was ten years old, all drank it with impunity. I do not think it would have been a fatal objection to his right to recover, if in other respects made out, that he was a person of a very peculiar constitution, and that none but persons of that very peculiar constitution would suffer. But it was also proved that other persons had suffered from the same water passing through similar lead pipes. The general mischief from the use of lead pipes is much less serious, if the percentage of those who suffer from it is small. It may be important to ascertain how that is on some other occasion, but no question as to that was raised in this case. I take it to be a matter of general knowledge that water collected from the fall of rain on a particular district derives its character from the nature of the strata over which it flows when collected on the surface, or through which it filters when flowing out in springs, which are

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generally in superficial strata. There are, sometimes, springs so deep seated as to derive their character from other strata. To take an extreme instance; no one, I think, can doubt that the hot mineral waters at Bath derive their peculiar qualities, which certainly render them very unfit for domestic use, from passing through deep-seated strata very different from those adjoining to Bath. I have no doubt that those hot springs are ultimately fed by rain which has fallen somewhere, and filtered down into those hot strata, but I think it probable that the rainfall which feeds them has fallen at a distance, and has been filtering far, perhaps for hundreds of miles, and for a long time, perhaps for years, before it comes to the surface at Bath. But there is no evidence here of there being any such deep-seated springs in this district. I think the evidence shews that the Blackmoorfoot district is one of those the water collected from which is what is commonly called "soft," the nature of the strata with which they come in contact being such as to contain but little of those minerals the absorption of which gives water the character of "hardness." There is, however, in the district found some iron pyrites—an ore of sulphur and iron, which, when exposed to air and water, undergoes a chemical change resulting in the production of sulphuric acid. And the evidence is that there was some (not very much) sulphuric acid in the water collected in the Blackmoorfoot reservoir. I do not think we need embarrass ourselves by thinking of the other reservoirs, for the water from the drinking of which the appellant has suffered came exclusively from Blackmoorfoot reservoir.

I think it must, for the purposes of this case, be considered as established that the water as brought down to and in the mains was soft water, with some sulphuric acid in it, excellent in that state for drinking. But I think it must also be considered as established that this water was such as, when brought in contact with lead, was capable of dissolving it, and producing some salt of lead which, if taken in sufficient quantity for a sufficient length of time, is noxious.

The evidence of the experts in this case differed as to the modus operandi. Those called for the defendants said that the quantity of sulphuric acid in this water was so slight that it

would produce no appreciable effect, but that so far as it did produce an effect it would be beneficial. There is a good deal of difficulty in making out what the evidence now given is. A good deal of the cross-examination of Dr. Tidy, beginning at page 138, Appx., consists in reading to him extracts from his evidence in the House of Lords on the Thirsk Water Bill. He certainly seems then to have expressed an opinion that soft water, when highly aërated, would, in running through a *new* lead pipe dissolve a very noteable quantity of lead, but that after running through the lead pipe for, I think he there says, three months, a deposition would take place, as I understand it, coating the lead pipe with some salt of lead not soluble in water, after which "the amount of lead dissolved would be comparatively nothing." The inference from that would seem to be that there was an objection to bringing soft water into use in towns by means of pipes of lead, which did not apply to bringing in hard water by that means, but that the objection would only be a practical one whilst the pipe was new, and might therefore be neglected.

Dr. Odling seems to have formerly thought that it was established as a fact that soft water did after a time coat the lead pipes with something so as to produce a protecting effect, but now to be less positive (page 145 E., Appx.), and Mr. Crookes seems to be now a good deal shaken in that opinion (page 149, Appx.). This all seems to point to a conclusion, rather unpleasant for the inhabitants of towns which are supplied from districts producing soft water, that they cannot use lead pipes without some risk. I do not know that it is necessary to form an opinion upon this question, but it shews how very important the question we are now discussing may be; for I suppose there is no doubt that very populous districts are supplied from sources such as Loch Katrine, Thirlmere, and others might be mentioned, which afford only soft water, and that in those the supply pipes are often if not always made of lead.

I think, however, that the question what remedy there is must depend on the true construction of the Act in each case. It may well be that on the true construction of one Act it would appear that the legislature intended to allow the use of water of such a degree of softness as will produce some injurious corrosion of

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lead pipes, and to allow it to be supplied through lead pipes, thinking that the quantity of lead taken up would be so small, that, though it might injure a few persons, it was better on the balance that this should be, rather than that the district should be deprived of water altogether, or put to the expense and inconvenience which would be caused by preventing the use of lead pipes, which are certainly very generally used; and yet that may not be the intention appearing on the construction of another Act.

The Act in the present case is the 32 & 33 Vict. c. cx. It provides that the corporation of Huddersfield may take over the old waterworks erected by the Commissioners under the 7 & 8 Geo. 4 c. lxxxiv. With those waterworks we are not in the present case concerned. But the Act also provides for getting a further supply of water and making a further reservoir, and, when that supply is obtained, enlarging the districts within which the corporation may supply water. The appellant's house is in that new district.

The Act 32 & 33 Vict. c. cx. incorporates the Waterworks Clauses Acts of 1847 and 1863, except the provisions with respect to the amount of profit to be received by the undertakers when the waterworks are carried on for their own profit. The 17th section of 32 & 33 Vict. c. cx., defines the district from which the new supply is to be derived. The reservoir from which the water is brought down to the main to which the service pipe supplying the appellant's house is attached is Blackmoorfoot, and with that only are your Lordships now concerned. It was, not very strongly, argued that the undertakers were in the position of persons selling water to the inhabitants of the district, and therefore that they were under an obligation to supply water fit to be used in lead supply pipes, that being the ordinary mode in which water is used. But I think that the duty imposed on the corporation does not extend so far. It may be that it imposes on them a duty to take all reasonable care and skill, and, if there had been a claim for damages on the ground that they had been guilty of neglect of that duty, it would have been necessary to consider this. The judge, in the exercise of his very wide powers of amendment, might have allowed an amend-

ment raising this question, but after the objection of the defendants' counsel, that he was not prepared with evidence to meet such a case, he would not have made such an amendment except on the terms that the trial should be postponed, and he was not asked to make it. I do not think this a mere technical objection.

Both Mathew J. on further consideration, and the Court of Appeal treated the case as if it depended exclusively on the Act, and, viewing it in that light, held, I think correctly, that the only absolute duty imposed on the corporation was to provide and keep, in the pipes to be laid down by them, which I think is correctly construed as the mains, "a supply of pure and wholesome water sufficient for the domestic use" of the inhabitants. The supply kept in the main was pure and wholesome, if it was taken as it there was. The only doubt I have had as to this is whether (as it was known that the supply pipes were likely to be made to some extent of lead, and after the making of the bye-laws it was known that they would certainly be made of lead) the water which when passed through the lead pipes would take up some poisonous salts of lead can properly be said to be "pure and wholesome." I think, however, it was so, and that the fault, if there was any, was in having lead pipes at all.

The 32 & 33 Vict. c. cx. s. 66 empowers the corporation, for the purpose of preventing waste, misuse, undue consumption, or contamination of the water, to make bye-laws. Under those actually made, they deprive the inhabitant, at whose expense they do the actual plumber's work, of all discretion as to the materials of which his service pipes are to be made. They prescribe that they shall be lead. I do not see that there is any reason to think that, if the discretion had been left to the inhabitant, there would have been any difference in the mode in or the material of which these service pipes would have been constructed. Even now the only change which can be suggested is that the half-inch pipe of the length of thirty-nine feet might be made of iron; which would no doubt diminish the chance of mischief by diminishing the quantity of lead. But, whilst lead is the material from which internal service pipes are made, that would only diminish it.

I do not know what hope there may be of cheapening the cost

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of production of aluminium, or in some other way giving the consumers a practical mode of getting service pipes of a material as tough and flexible as lead, and not having this dangerous quality of poisoning water, or at least soft water when not so devoid of oxygen as to be exceedingly insipid. If there is such a discovery ever made the bye-law which stands in the way of the use of it may be repealed. But now I am not able to see in what way any claim can be made against the corporation on account of these bye-laws. I do not say none can, but I certainly think none has been made. And I think till such a claim is made in such a way as to give the corporation an opportunity to answer it, your Lordships cannot decide it.

LORD WATSON:—

My Lords, I take the same view of this case as my noble and learned friend the Earl of Selborne, and in these circumstances I do not propose to occupy the time of the House by reading the observations which I have prepared. I shall simply express my concurrence in the judgment which has been delivered by the noble and learned Earl.

LORD BRAMWELL:—

My Lords, I am of opinion that this judgment should be affirmed. The plaintiff's charge in his statement of claim is, that he, being entitled to a supply of pure and wholesome water from the defendants, they supplied him with water not pure and wholesome, but which was contaminated with deleterious ingredients. This complaint is not only unproved, but, in my judgment, the contrary is proved. The supply by the defendants is from the main to the service pipes of the plaintiff. The water supplied at the point of supply was pure and wholesome, with no deleterious foreign or adventitious ingredient. In its passage along the plaintiff's service pipes it became otherwise. It is impossible to say that water is pure and wholesome, and free from deleterious ingredients, if passed through iron pipes, but not if passed through lead pipes. The pipe is bad but the water good. The plaintiff, therefore, has failed to make out his case.

It was asked what if, under their powers of compelling persons

to take a supply of water, they supplied it through service pipes of lead with the injurious consequences that have followed in the plaintiff's case? I decline to give an opinion on this till I hear the case, and will content myself with saying that, if the defendants would be liable, it would be precisely for the reason which does not exist here, viz., that the water they supplied was not pure and wholesome. I will only add that, in the case put, they are not bound, only entitled, to force a supply.

This opinion is a short one. If that is a defect, I can only say I am sorry. For I cannot remedy it. I do not know which of the matters I affirm is denied. There is no doubt that to recover the plaintiff must prove the presence of deleterious matter in the water supplied. I can see no evidence that the water in the mains had deleterious matter in it. The scientific witnesses seem to be, or to have been, in a state of some uncertainty as to the effect of pure water on lead, or rather, perhaps, they seem to have once thought, but to have changed their opinion, that pure water did indeed corrode lead, but not so as to hold lead in solution. But I repeat, whatever may have been, or may be, their opinion, or that of any of them on this, I cannot see any evidence that there were deleterious ingredients in the water in the mains. It is true that the water was not to be drunk there, but in the houses of the consumers. It was, however, to be conveyed to those houses in the pipes of those consumers. It was in them, in the course of that conveyance, and by them, that the water was made unwholesome. If indeed the defendants, having notice that lead pipes were unfit to convey such water, insisted on the consumer using no other, it may be that there would be a refusal to supply, and so a cause of action. But that is not the cause of action here. I repeat, first; The complaint is that the water supplied contained deleterious ingredients; secondly; The water was supplied to the plaintiffs' pipes; thirdly; At the point of supply it contained no deleterious ingredient.

I decline to consider any question of negligence or misfeasance in the use of lead pipes. No such case is before us. So also I decline to consider what would be the result if the legislature had directed lead pipes should be used—merely observing that if the water was fixed by the statute, and the pipes, it might

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plausibly be contended that the "pure and wholesome" supply meant as pure and wholesome as under such circumstances it could be.

It may be said, this is deciding the case on technical grounds. Willes J. said that law without technicality was impossible. I content myself with saying that, as long as our law says that a plaintiff to succeed must do so on the *allegata et probata* the decision must be governed by them, and them alone.

LORD FITZGERALD:—

My Lords, before reaching the conclusion at which I have finally arrived I thought it essential to examine the pleadings and ascertain the exact issue.

The action was preceded by a notice, the substance of which was that the mayor, aldermen, and burgesses of Huddersfield supplied, sold, and delivered to the said John Jessop Milnes certain water, which, according to the provisions of the Act of Parliament (10 & 11 Vict. c. 17 s. 35), they were bound and required to supply of a pure and wholesome nature, and sufficient for his domestic use, whereas the same water was not of such pure and wholesome nature, but contained lead, free acid, and other substances likely to injure the health of the said John Jessop Milnes. Nothing now turns on the word "sold." The fourth paragraph of the statement of claim which alleged a sale was struck out by amendment. The notice, it will, however, be observed, rests entirely on sect. 35 of the General Act of 1847, and on the duty or obligation created by that section. The statement alleges, in conformity with that notice, that the plaintiff "was entitled as such inhabitant by virtue of the said statutes to demand and have a supply from the defendants of pure and wholesome water sufficient for his domestic use. In or about March 1875 the defendants laid down their water-mains near the plaintiff's house, and for reward then paid to them by the plaintiff put down leaden service pipes to conduct the water to the plaintiff's said house and connected such pipes with their said mains. From the time of making such connection of the said pipes with the mains, the defendants have for reward continuously supplied the plaintiff with water from such mains through the said service pipes for his

domestic use. In or about August 1881, and for many years previously thereto, the water which the defendants thus supplied to the plaintiff was impure and unwholesome. It was contaminated with deleterious substances. It has from that time been, from time to time or continuously, impure and unwholesome and contaminated as above stated." The plaintiff's particulars allege that "the deleterious substances with which the said water as supplied by the defendants to the plaintiff was contaminated" were "lead or some poisonous compounds of lead and acids which acted upon the surface of the lead pipes through which the water was conveyed to the plaintiff." The statement of defence is in substance:—"The defendants admit that, in or about October 1874, they laid down their water mains near the said house now occupied by the plaintiff. The defendants put down leaden service pipes to conduct the water to the said house at the request of and for reward then paid to them by the plaintiff's landlord, or other his predecessor in title. The said service pipes so put down were forthwith connected with their said mains. The defendants have continuously supplied the said house with water from the said mains through the said service pipes since October 1874, and have thus supplied the plaintiff since he became an inhabitant as aforesaid. The water so supplied by the defendants to the plaintiff was pure and wholesome water, and was supplied in its natural condition, uncontaminated and pure, just as derived from the springs and sources authorized by the said special Acts in that behalf," and on that defence the plaintiff joined issue. It will be perceived that the matter which the plaintiff undertook to establish was that the defendants in violation of their duty under sect. 35 of the Act of 1847, "supplied the plaintiff with water from such mains through the service pipes which was impure, being contaminated with deleterious substances."

The requisition on which the water was supplied to plaintiff's premises was as follows:—"To the corporation of the borough of Huddersfield,—19th of October 1874.—Gentlemen,—Please supply with water the under-mentioned property in accordance with your rules and regulations. Description and situation of property,—1, House, Grove Place, Dalton, occupied by J. J. Milnes. I hereby agree to pay for the pipe to supply water in accordance with

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the above description. I am, Gentlemen, yours respectfully,—William Marsden." I understand by "the pipe" the thirty-nine feet of half-inch pipe from the defendant's main to the plaintiff's premises, to which at a subsequent period fifty-three feet of three-eighths inch pipe was added at the plaintiff's request to conduct the water to a tap at the rear.

In the view which I take of this case it is not necessary for me to examine minutely or to criticise the evidence of the professional experts which, as was to be anticipated, exhibits considerable divergences of opinion. There is a statement in the appellant's case that "it was admitted at the trial that the water supplied to the appellant was wholesome if drunk at the mains," and Mathew J. in his judgment states, and no doubt with entire correctness, that "it was not contended that there had been any want of care or skill on the part of the defendants or their agents, and it was admitted that the water while in the mains from which the plaintiff's supply was taken was pure and wholesome, and in its natural condition, as it was drawn from the sources specified in the Act of 1869. It was further admitted that the material used for the service pipes was that which was best adapted for the purpose, and that it had been used with perfect safety for the supply of a great number of large towns." At the close of the trial, after some skirmishing as to whether some and what questions should be sent for the decision of the jury as to the alleged impurity of the water, and whether or not it was due to sulphuric acid, the judge finally says—"Mathew J.: The only question as it seems to me, for the jury is the question of the amount of damages. Mr. Wills: I think so; I think the specific nature of the impurity, if I am right in the general result of the evidence, is proved. Mathew J.: That this water became unwholesome on being delivered from the service pipe, and the defendants are responsible for the delivery from the service pipe. That is your position. Mr. Wills: Yes, I think the particular cause seems to be immaterial. That has been my view throughout." And damages were thereupon assessed by the jury, all questions being reserved for argument. The practice of this House now is to eliminate the case from mere technicalities, and let decision rest on principle and on the substantial merits.

The final object of our system of pleading, so far as it has been suffered to continue, is to develope a certain and material issue on which the rights and liabilities of the parties may be determined, and should your Lordships confine the plaintiff to the issue which he has tendered to his adversary you will decide on the reality and substance of this case. The plaintiff has alleged the nature and extent of the defendants' obligation and assigned a breach of it. The onus lies on the plaintiff.

The obligation of the 35th section of the General Act of 1847 is that which we have first to deal with. It is not disputed that the word "pipes" in that section is to be interpreted as meaning "the mains to be laid down by the company," and the obligation cast on the defendants by that section is "to provide and keep in their mains a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the district" who, as thereafter provided, "shall be entitled to demand a supply." The water should be pure and wholesome in the mains, but the statute does not add that it shall continue to be pure and wholesome under all circumstances. I have been unable to find in the Act of 1847 any provision that would add to or increase that obligation in any point material in the present action. The Special Act by its 27th section incorporates the provisions of the Act of 1847, and enacts that it "shall apply to the whole of the waterworks undertaking of the corporation," but it does not increase the obligation of s. 35. There are other sections in the Act of 1869 to which I will presently have to advert.

I have come to the same conclusion as my noble and learned friends Lords Blackburn and Bramwell, but with some and not inconsiderable hesitation, that the plaintiff has failed to establish any breach of the statute duty or obligation on which alone he rests his action, and that judgment should therefore be given for the respondents.

It is sometimes very desirable that your Lordships, dealing with cases where several questions fairly arise, any one of which may be sufficient in itself to dispose of the action, should nevertheless proceed to express the decision of this House on all or more than one of the questions in the cause. As for example, in the very recent case of *Colonial Bank* v. *Whinney* (1), where

(1) *Ante*, p. 426.

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two questions arose on the interpretation of a section of the Bankruptcy Act of 1883, the decision of either of those questions against the respondent rendered it necessary to reverse the decision of the Courts below and give judgment for the appellants. Your Lordships, however, decided both questions, and adversely to the respondent. Those questions, though distinct, were fairly and properly raised on the pleadings, there was an issue on each, the Courts below dealt with and expressed their decision on each, and it was expedient for the public good that your Lordships should do likewise. In the case now before the House it seems to me to be inexpedient to express an opinion on the several other questions which have been raised only in argument, and which affect the interests of undertakers for supply of water and of water companies as well as consumers throughout the United Kingdom.

My noble and learned friend the Earl of Selborne in his eloquent reasoning refers principally to one view of the case, which is by far the most important of all, but which it seems to me can be properly settled on a firm and just basis by legislation only. The statute of the 10th of the Queen became law on the 23rd of April 1847, and in the thirty-nine years which have since elapsed, experience has taught many lessons, and amongst others the necessity of binding water undertakers and water companies with strict and rigid fetters and of defining very clearly their liabilities towards the public. The provisions of that Act are scarcely adequate to the exigencies of the present day, and it may be desirable to reconsider them. It has been already observed that there is no count for negligence, nor any allegation of want of due and reasonable care on the part of the corporation, and a large question has been raised whether an action lies against the undertaking corporation in the absence of these averments, and on that question I refrain from indicating any opinion.

Referring now to the Act of 1869, and to the bye-laws framed under its 66th section, though entertaining the opinion that the entire length of lead pipe from the main to the tap at the rear of the plaintiff's house with the exception of the stop-tap by which the corporation regulates the supply, is the property of the plaintiff, though under the control and management of the corporation, yet

I forbear to express any opinion as to whether the material was, on the whole, improper to be used, or whether the bye-laws which prescribed its use were ultra vires, or whether an action lies against the corporation in any shape for the consequences of thus prescribing lead or for the mode of supply after the water leaves the mains. It will be seen thus that the conclusion which I have arrived at is that the water to be so supplied was to be supplied from the mains. As it came from the mains it was pure and wholesome. It was "conducted" from the mains through the pipes of the consumer to the consumer for his use, and it was in those pipes that it took up "lead."

In my opinion the plaintiff has failed to sustain this action, and as to whether he can maintain any other and what action I offer no opinion.

LORD HALSBURY :—

My Lords, the plaintiff must, in order to succeed in this case, shew a breach of the duty created by the 35th section of the statute 10 & 11 Vict. c. 17. None of your Lordships have entertained any doubt that, upon the mere construction of the words of the section, the pipes referred to therein are the main pipes, and it is not suggested as a matter of fact that the water in the pipes was not pure and wholesome, but it must be admitted that the section does imply that the water is to be there collected for domestic use, and to be distributed for domestic use according to the process and ordinary method by which water is and was distributed for domestic use at the time of the passing of the Act.

Now, I think it is proved that the water was rendered otherwise than pure and wholesome by its passage along the supply pipes, which, with the assent, if not the direction, of the defendants, were connected with the defendants' main pipes. I think it was found that the plaintiff has suffered grievously from the effect of drinking water thus rendered unwholesome, but I am unable to see that the section intended to deal with any such condition of things. It may be that the legislature erroneously assumed that, if the water was pure in the main pipes, it would either continue to be pure for domestic use, or that the contract relations between the company or corporation to supply and the

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customer to receive might safely be left to themselves, or, what is, I think, still more likely, the idea of impurity resulting in the act of supply to the houses by the chemical quality of the water never occurred to the legislature at all. At all events, I am unable so to construe the section that it shall impose an obligation that after the water has left the mains it shall be of such a chemical quality as that it shall be incapable of acquiring any unwholesome quality, whatever may be the medium through which it may be conveyed. This, it appears to me, disposes of the plaintiff's cause of action as set forth in his statement of claim, and as sought to be found at the trial. I decline to consider any other form of action, or any other liability under which the defendants might be sued.

LORD ASHBOURNE :—

My Lords, every one who has heard this case must sympathise with the plaintiff, and any one who holds the view opposed to his claim must do so with some hesitation after the very powerful reasoning of the noble and learned Earl opposite.

After the best consideration that I can possibly give to this case I have arrived at the conclusion that the judgment appealed from should be affirmed, and for the reasons which have already been given by such of my noble and learned friends as have arrived at the same conclusion.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 16th July 1886.

Solicitor for appellant: *C. Fitch, for Milnes & Marshall, Huddersfield.*

Solicitors for respondents: *Van Sandau & Co. for G. L. Batley, Huddersfield.*

[HOUSE OF LORDS.]

JUAN JOSÉ DE LA TRINIDAD CONCHA Appellant;

AND

MANUEL ANTONIO CONCHA and ADELINDA CONCHA . . . . . } Respondents.

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Estoppel—Res judicata—Judgment in rem—Judgment inter partes—Probate Court, Decree of as to Domicil—Judgment, finding of Issue not necessary to —Practice—Cross-examination of Witness upon his Affidavit—Rules of Supreme Court, Order XXXVII., *rr.* 1, 5, 21, 22—*Order* XXXVIII., *rr.* 21, 28.

A native of Chili made his will in London and died. A caveat having been entered on behalf of his daughter, the executors propounded the will in solemn form, alleging that the testator was domiciled in England. The daughter pleaded that the deceased was at the date of the will and until his death domiciled in Chili, and that the will was not duly executed according to the law of Chili. Upon this plea (inter alia) the executors took issue. The judge of the Probate Court made a decree by which he pronounced for the validity of the will, found that the deceased was at the date of the will and at his death a domiciled Englishman, and decreed probate to the executors. The daughter afterwards filed a bill against the executors, alleging that the testator was a domiciled Chilian, that his will being executed in England according to English law was good by the law of Chili but so far only as the testator could by the law of Chili dispose by will of one-fourth of his personal estate, and that the other three-fourths belonged to the daughter. The executors by answer set up the decree of the Probate Court as a bar. An order having been made for inquiry as to the testator's domicil, in an administration suit under circumstances which (it was contended) made it equivalent to an order in the suit by the daughter against the executors, the question whether the order was right was litigated between the daughter and the residuary legatee:—

Held, affirming the decision of the Court of Appeal (29 Ch. D. 268), that the decree of the Probate Court was not conclusive in rem as to the domicil, because the finding as to the domicil was not necessary to the decree:—

Held also, affirming the decision of the Court of Appeal, that for the same reason the decree of the Probate Court was not conclusive inter partes as to the domicil, as between the daughter and the residuary legatee, for the executors could not, by litigating in the Probate suit a question of domicil which it was not necessary to decide for the purposes of that suit, conclude the residuary legatee as to the testator's power of disposing of his property, and that as the residuary legatee was not bound the daughter could not be bound, since estoppel must be mutual.

On the prosecution of an inquiry added to a decree one party filed an

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affidavit by a person resident in South America, and gave notice to read it, whereupon the opposite party gave notice that he required to cross-examine the deponent, not saying when, where, or before whom :—

Held, affirming the decision of the Court of Appeal (32 Ch. D. 133), that Order XXXVIII. r. 28, excluding an affidavit from being read, except by special leave, unless the deponent is produced for cross-examination—even supposing that Order XXXVII. rr. 21, 22, make that rule applicable to evidence on an inquiry, and supposing that Order XXXVIII. r. 28, applies to a witness resident out of the jurisdiction—did not exclude the present affidavit, as the notice for cross-examination did not follow the terms of Order XXXVIII. r. 28 :—

Held also, that the order of the Court of Appeal admitting the affidavit as evidence, without prejudice to any application by the opposite party within fourteen days for the cross-examination of the deponent in any place in South America before some proper person to be appointed for that purpose, was right under all the circumstances.

APPEALS from two orders of the Court of Appeal reported as *De Mora* v. *Concha*, one made the 21st of February 1885 (1), the other made the 10th of March 1886 (2).

The facts relating to the order of the 21st of February 1885 are set out at length in the report of the decision of the Court of Appeal. Those material to the present report were as follows:—Juan José Concha a native of Chili died in France in 1860 having made his will and codicil in London, by which he appointed De Mora and Mannequin executors, and made the appellant, Trinidad Concha, residuary legatee. A caveat having been entered by the testator's daughter, the respondent Adelinda, the executors as plaintiffs propounded the will and codicil, alleging in the declaration that the testator, "a native of the republic of Chili but of late domiciled in England and residing at No. 3 Adam Street Adelphi, Middlesex,"—made his last will, &c. Adelinda as defendant pleaded that the deceased was a native of Chili and that at the time the will and codicil bore date, to wit the 29th of November 1859, was a domiciled subject of the Chilian republic and so continued until his death, and that the will and codicil were not executed with the forms and requisites of the law of Chili: that the deceased had not complied with the rules and restrictions imposed upon testamentary dispositions by the law of Chili; and that the will and codicil were therefore not duly executed, but that if executed they were

(1) 29 Ch. D. 268. (2) 32 Ch. D. 133.

inoperative notwithstanding. The executors by their replication denied (1) that the deceased was either at the time when the will and codicil were executed or at the time of his death a domiciled subject of the Chilian republic, and took issue thereon: denied (2) that the will and codicil were not duly executed, and took issue thereon: denied (3) that the will and codicil were inoperative, and took issue thereon. The cause was heard before the judge of the Probate Court, Sir C. Cresswell, who on the 28th of July 1860 made the following decree:—

"Afterwards on the 26th 27th and 28th July 1860 the judge, having taken the oral evidence of the witnesses produced as well on behalf of the plaintiffs as of the defendant and having heard counsel on behalf as well of the plaintiffs as of the defendant, by his final decree pronounced for the force and validity of the last will and testament of Juan José Concha the deceased in this cause, with a codicil thereto, bearing date respectively the 29th day of November 1859, and that the said deceased was at the time of the date of the said will and also at the time of his death a domiciled Englishman, and decreed probate of the said will and codicil to José Maria de Mora and Theodore Mannequin the executors named in the said will, but made no order as to costs."

The executors afterwards brought an administration suit in Chancery against Trinidad, the present appellant, and his mother. In that suit (*De Mora* v. *Concha*) a decree was made on the 17th of November 1860.

On the 27th of January 1862 Adelinda filed a bill against the executors, alleging that the testator was at his death a domiciled Chilian; that his will being executed in England and with the formalities required by the English law was valid according to the law of Chili to the extent to which as a domiciled Chilian the testator could by the laws of Chili dispose of his property but not further or otherwise: that the will had been proved in the Probate Court: that the testator left surviving him no widow and no issue other than the plaintiff Adelinda, and that in consequence thereof according to the laws of Chili one fourth part only of his personal property passed by or was subject to his will, and the other three fourths, subject to their due proportion

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of his debts and liabilities, devolved on his death upon the plaintiff as such only child. The bill prayed for a declaration that the testator had at the time of his death a Chilian domicil and that three fourths of his personal estate, subject as aforesaid, had devolved upon the plaintiff, and for the necessary directions accordingly. The answer of the executors (inter alia) set up the decree of the Probate Court as a bar, and insisted that it was not competent for the plaintiff to dispute the fact of the testator having been a domiciled Englishman at the time of his death. No further steps were taken in this suit (*Concha* v. *Mannequin*). On the 14th of February 1877 an order was made by the Court of Appeal staying all further proceedings in *Concha* v. *Mannequin* and in certain other causes, with liberty to any of the parties to apply in the administration cause (*De Mora* v. *Concha*) to add to the decree in that cause of the 17th of November 1860 all accounts and inquiries in the causes in which further proceedings were ordered to be stayed. On the 24th of June 1881 an order was made that the conduct of the administration cause (*De Mora* v. *Concha*) be transferred from the plaintiff Mannequin, the surviving executor, to the present appellant, Trinidad. On the 25th of February 1882 an order was made by Bacon V.C. in the administration cause (*De Mora* v. *Concha*) that the service of any notices or proceedings upon the plaintiff Mannequin be dispensed with, and that for all purposes the defendant Trinidad (the present appellant) be nominated to represent the estate of the testator in that cause.

On the 19th of July 1884 Bacon V.C. in the administration cause (*De Mora* v. *Concha*) on the application of Adelinda and her husband (the other respondent, Manuel Antonio), made an order for several inquiries in addition to those ordered by the decree of the 17th of November 1860; and (inter alia) for an inquiry what was the domicil of the deceased at the time of his death, and what part of his personal estate according to the law of such domicil he was able to and did effectually dispose of by his will, and who according to the law of such domicil was at his decease entitled to so much of his personal estate as was not effectually disposed of by such will, and who was now entitled thereto.

The Court of Appeal (Baggallay, Bowen and Fry L.JJ.) affirmed this order (1). From this decision Trinidad, the residuary legatee, appealed.

July 22, 23. *Arthur Charles* Q.C. and *Seward Brice* for the appellant:—

The testator's daughter Adelinda is not at liberty to raise the question of the testator's domicil, the decree of the Probate Court having conclusively established that his domicil was in England. That decree is an estoppel both as a judgment inter partes and as a judgment in rem. First, inter partes. The order of Bacon V.C. of the 19th of July 1884 now under appeal, though actually made in the administration cause (*De Mora* v. *Concha*), must be considered as having been made in the cause by Adelinda against the executors (*Concha* v. *Mannequin*), this being the effect of the order of the 14th of February 1877. This being so, the order under appeal is made in a cause in which the litigant parties are the same as they were in the probate suit; Adelinda and the executors. Adelinda's claim in her action against the executor is a creditor's claim: a claim of debt against the executor. This is clearly so by the law of Scotland: 2 Fraser, Husband and Wife 2nd ed. p. 976. That this is also the law of England appears from what is said about the writ de rationabili parte bonorum in 1 FitzHerbert, New Natura Brevium (ed. 1794) p. 122 L. See also per Lord Westbury in *La Cloche* v. *La Cloche* (2). Being a creditor's claim it must have been brought against the executors: the legatees have nothing to do with it; and the parties are therefore the same in the present litigation as in the probate suit. This is so whether the English law be applicable to the will so as to make the whole estate disposable, or the Chilian so as to make only one fourth. In either case the whole estate vested in the executors as such: and if so the residuary legatee is bound as being privy. The very principle now in question was determined in favour of the appellant's view in *Bouchier* v. *Taylor* (3), as appears from the reasons for the judgments given in Hargrave's Law Tracts pp. 472–476. It

(1) 29 Ch. D. 268. (2) Law Rep. 3 P. C. 125.
(3) 4 Bro. P. C. 708.

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is said contrà that the Probate Court need not have determined the domicil: but that is not so: the parties had raised that issue; and the estoppel depends on what the parties allege. A man must have one and cannot have more than one domicil: *Udny* v. *Udny* (1); and the parties in the probate suit were bound to allege some domicil: *In the Goods of Deshais* (2). As to the forms of issues in the Probate Court regulating trials in 1860 see the Probate Rules set out in Coote's Probate Practice, Common Form and Contentious Business (5th ed.) pp. 455, 458; Form No. 6 p. 468; Form No. 11 and pp. 471, 475. Suppose instead of trying that issue himself the judge of the Probate Court had sent it to be tried by a jury at the assizes, and had had the verdict entered and given judgment upon it; that would have been a judgment on that issue binding as an estoppel: *Outram* v. *Morewood* (3); see also *Hankin* v. *Turner* (4); and *Barrs* v. *Jackson* (5) per Lord Lyndhurst following *Bouchier* v. *Taylor* (6). [They also referred to *Isherwood* v. *Cheetham* (7).]

Secondly, the decree of the Probate Court was a judgment in rem upon the question of domicil and therefore binding upon all the world, because it was a finding of status which was the foundation of the judgment and was necessary for the judgment. This is so even if the judgment may be founded upon either of two alternatives, and the judge decides upon the wrong one: a mistake of fact makes no difference: *Reg.* v. *Inhabitants of Hartington* (8) per Coleridge J. That the grant of probate is conclusive in rem upon the question of domicil appears from *Whicker* v. *Hume* (9).

Fischer Q.C. *Rigby* Q.C. and *Stewart Smith* for the respondents were not heard.

The appeal from the order of the 10th of March 1886 was then heard, July 23, 26. The facts relating to this order are set out in the report of the decision below (10), and in the judgment of Lord Herschell L.C. For the present purpose the following brief statement will suffice:—

(1) Law Rep. 1 H. L., Sc. 441.
(2) 34 L. J. (Prob.) 58.
(3) 3 East, 346.
(4) 10 Ch. D. 372.
(5) 1 Phill. 582.
(6) 4 Bro. P. C. 708.
(7) 31 L. J. (Prob.) 99.
(8) 4 E. & B. 780, 793.
(9) 7 H. L. C. 124, 131, 143.
(10) 32 Ch. D. 133.

Bacon V.C. having by his order of the 19th of July 1884 ordered the inquiry stated above, the present respondents gave notice to the present appellant of their intention to read (among others) an affidavit of Julian Concha (resident in South America). The appellant gave the respondents notice that he desired to cross-examine that witness, but without saying when, or where, or before whom.

The Court of Appeal (Cotton, Bowen and Fry L.JJ.) reversing an order of Bacon V.C. made the order now appealed from ordering that the affidavit be read as evidence on the inquiries directed by the order dated the 19th of July 1884, "notwithstanding that Julian Concha is not produced for cross-examination" by Trinidad; the order not to prejudice any application that Trinidad might be advised to make on or before the 24th of March 1886 for the cross-examination of Julian Concha in any place in South America before some proper person to be appointed for that purpose; and not to prejudice the present respondents from making any objections to such application.

Arthur Charles Q.C. and *Seward Brice* for the appellant:—

The order violates a fundamental rule of practice. It is the inherent right of a party to cross-examine a deponent, or to have the opportunity for doing so; and it is the duty of the party applying to use the affidavit to provide the opportunity: *Dunne* v. *English* (1). The only exceptions to this rule are where death or insanity or some similar event make cross-examination impossible; and in some cases of death the evidence cannot be received without cross-examination: *Browne's Case* (2). This is the general and substantive rule of law; and the Orders and Rules under the Judicature Act cannot alter the old rule. No such power of alteration was given by sect. 17 of the Judicature Act 1875; the only power was to deal with practice and procedure, not with substantive questions of law. If, therefore, the words "unless by special leave" in Order XXXVIII. r. 28 give a power of dispensing with cross-examination they are ultrà vires. The notice given by the appellant was a good notice within Order XXXVIII. r. 28. It was impossible to require the produc-

(1) Law Rep. 18 Eq. 524. (2) Hardr. 315.

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tion of the witness "at the trial" as the rule says, for this was after trial, and it was for the party producing the witness to provide the place and the occasion. The spirit and intention of the rule are to exclude an affidavit unless there has been opportunity for cross-examination, and it clearly appears that the framers of the rule intended the party tendering the affidavit to produce the witness and at his own expense; and the rule as to expense applies even where the witness is out of the jurisdiction: *Richards* v. *Goddard* (1). Even if the appellant's notice were insufficient the Court ought not to treat it as invalid: Order LXX. It may be that Order XXXVII. rr. 1, 5, 21, 22 and Order XXXVIII. rr. 22, 28 do not apply to an inquiry after trial, or to the case of a witness out of the jurisdiction. If so, the appellant falls back on the old rule of law. The Court of Appeal was wrong in putting on the appellant the burden of making an application to cross-examine. That burden ought to have been laid on the other side.

Fischer Q.C. *Rigby* Q.C. and *Stewart Smith* for the respondents were not heard.

LORD HERSCHELL L.C.:—

My Lords, the first matter with which your Lordships have to deal is an appeal from an order of the Court of Appeal of the 21st of February 1885 affirming an order of Bacon V.C. That order directed, in an administration suit to which I will presently refer, that there should be an inquiry as to what was the domicil of one Juan José Concha at the time of his death, and what part of his personal estate according to the law of such domicil he was able to dispose of by his will. It was urged on behalf of the appellant before the Vice-Chancellor and afterwards in the Court of Appeal that that inquiry ought not to have been directed, inasmuch as the question put by that inquiry had been conclusively answered by the decision of a competent tribunal.

The matter arose in this way: Juan José Concha was a Chilian by birth, and his original domicil was undoubtedly Chilian. He died having made a will in this country with the formalities required by the law, relating to wills, of this country. By his

(1) Law Rep. 17 Eq. 238.

will he appointed two gentlemen, named De Mora and Mannequin, his executors, and made the residuary bequest in favour of the present appellant, Juan José de la Trinidad Concha. The executors propounded that will, and applied to the Court of Probate for probate to be granted to them. In the declaration in that probate suit, which was commenced in the year 1860, they alleged "that Don Juan José Concha was a native of the Republic of Chili, but of late domiciled in England," and that he had made his last will and testament appointing them his executors. The present respondent, Adelinda Concha, who alleged herself to be a daughter of Juan José Concha, set up, in answer to that declaration of the executors, that "Juan José Concha was a domiciled subject of the Chilian Republic, and so continued" from the time of his will to the time of his death; "that the will and codicil were not executed in accordance with the forms and requisites of the law of Chili; that the deceased had not complied with the rules and restrictions imposed upon testamentary dispositions by the law of Chili"; and that therefore the will and codicil were not duly executed. The words, "that the deceased had not complied with the rules and restrictions imposed upon testamentary dispositions by the law of Chili," referred to a provision of the law of Chili by which a testator has not that full testamentary power which exists in this country, but can only dispose of a part of his moveable property at all events, the other part going, notwithstanding a will purporting to dispose of all his property, to his children or other relatives.

To that defence the plaintiffs reply: First, they deny that Don Juan José Concha, the deceased, was either at the time of the execution of his will or at the time of his death a domiciled Chilian, and they take issue thereon. Secondly, they deny that the will and codicil were not duly executed and they take issue thereon.

Upon the pleadings as put forward by the parties in that suit, the matter came before the then judge of the Probate Court, Sir Cresswell Cresswell, for decision, and that learned judge made a decree by which he "pronounced for the force and validity of the last will and testament of Juan José Concha, the deceased in the cause, with a codicil thereto," and decreed probate of the will

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and codicil to the executors named in the will. By that order undoubtedly the learned judge determined that the will was a will validly executed, under which executors were properly appointed, and that those executors were entitled to probate of the will.

But in addition to the language which I have read, the order contains these words—after pronouncing for the force and validity of the will—"and that the said deceased was at the time of the date of the said will and also at the time of his death a domiciled Englishman." Now I do not think it can be disputed that that finding was not essential to the judgment in the cause. If there had been no such finding, or if the finding had been the other way, it might equally well have been the case that the learned judge was bound to decree probate of the will to the executors, because the defence of the defendant necessarily took up two grounds (one alone would not have been enough), namely, that the deceased was a domiciled Chilian and that according to the law of Chili the will was not validly executed. If although a domiciled Chilian the will was validly executed according to the law of Chili, there cannot be the slightest doubt (indeed it was admitted at the Bar) that this decree for probate must have followed, as a necessary consequence, the hearing of the cause. It is admitted that there was evidence before the learned judge that the law of Chili did make such a testament as this a valid one; but it was urged that although it may not have been necessary for the learned judge to decide that the deceased was a domiciled Englishman, yet that in fact he did so decide and that his decision was recorded in the order of the Court; and it is said that having so decided, and his decision being so recorded, the decision of the learned judge upon that point is conclusive; first, it is said, conclusive in rem against all the world, and then conclusive inter partes between those who were then litigating.

It is upon that ground that the appellant now alleges that this inquiry ought not to have been directed in the administration suit, which arose in this way. After probate of the will had been granted an action was raised for the purpose of obtaining a decree for the administration of the deceased's estate by the executors, in which they were plaintiffs, and the appellant, the residuary

legatee, was the defendant. I will deal presently with the contention that the inquiry was not an inquiry instituted in that suit, but in another suit to which our attention was directed. But apart from that point, which may be important on the question of there being an estoppel inter partes, the substantial way in which the appellant shapes his case is this, that this very point having been conclusively determined by a competent tribunal, it is not right or proper that it should be reopened by such an inquiry as the Vice-Chancellor ordered.

It is first put as an estoppel in rem, conclusive against all the world. That the mere fact that probate of the will was granted is not so conclusive is established beyond all possibility of question by a decision of your Lordships' House. In the case of *Whicker* v. *Hume* (1) that very point was determined, and that opinion was expressed by all the noble and learned Lords who advised the House on the occasion. Lord Cranworth says: "The first question made is one that was extremely important, namely, the point whether probate was or was not conclusive evidence of the domicile. Now," he says, "I have no hesitation in saying that the affirmative of that proposition cannot be a correct exposition of the law. A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But it proves nothing else." Then he puts the very case that has now arisen before your Lordships: "Suppose there was a country in which the form of a will was exactly similar to that in this country, but in which no person could give away more than half his property. Such an instrument made in that country by a person there domiciled, when brought to probate here, would be admitted to probate as a matter of course. Probate would be conclusive that it was testamentary, but it would be conclusive of nothing more, for after that there would then arise the question how is the Court that is to administer the property to ascertain who is entitled to it? For that purpose you must look beyond the probate to know in what country the testator was domiciled, for by the law of that country the property must be administered."

That appears to me to determine beyond all possibility of

(1) 7 H. L. C. 124, 156.

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question that the mere granting of probate by the learned judge in the Court of Probate under such circumstances as these did not conclusively determine what was the domicil of the testator. But it is said although his decision would not necessarily have determined that question had it been delivered in a different form from that which it took, and had the order been in a different form, yet it is conclusive because in this particular case the learned judge affected to determine that point and his determination was recorded in the order. For my part I think it would be impossible to hold that a question of that sort is conclusively determined because the learned judge has expressed his opinion upon a matter of fact when that matter of fact was not essential to his decision. All that is essential to the decision that the plaintiffs were entitled to probate may be taken perhaps to be conclusively determined; but I do not see how anything more than this can be taken to be conclusively determined. Certainly it would be very strange, if although the finding in the decree as to the testator's domicil could not be appealed from because it was not essential to the decision, nevertheless it conclusively determined the fact against all the world, upon which the opinion of no tribunal except that of the judge of first instance could be taken. That appears to me sufficient in itself to shew that as a judgment in rem it would be impossible to hold that it had force and effect and was therefore an estoppel against all the world when the same question afterwards arose.

I pass therefore to the question whether it was an estoppel, as is alleged, inter partes. The parties to that litigation undoubtedly were the executors and Adelinda Concha, the present respondent; and it is said that after probate had been decreed Adelinda Concha filed a bill against the executors in which she claimed a share of the estate as belonging to her by reason of its being incompetent to the testator, according to the law of Chili, to dispose of it. Besides that suit there were many other suits, to which I need not refer beyond mentioning the fact that there were such suits; and there was also the administration suit to which I have already alluded. An order was made by the Court that all the suits but the administration suit should be stayed, but that in that suit in addition to the inquiries which would be

requisite therein, any other inquiries which would be requisite in any of the other suits might also be ordered. In that state of things an inquiry was ordered as to whether Juan José Concha was domiciled in Chili or in this country. Now it is said that the inquiry must be taken to be an inquiry made, under the power to which I have just alluded, in a suit in which Adelinda Concha was plaintiff against the executors. I own I am at a loss to see, even if it be material, why it must be taken to be an inquiry in that suit. No doubt any inquiry which would not be properly an inquiry in the administration suit must be taken to be an inquiry that is relevant in one of the other suits. But in the administration suit itself the question arose how the estate was to be administered. One of the questions was whether Adelinda Concha was entitled to a share, or whether it all passed under the will. It appears to me therefore that in that suit it was necessary, if it was a proper inquiry at all, to make the inquiry ordered by the Vice-Chancellor as to the domicil of Juan José Concha. Supposing the inquiry to be so ordered in that suit, was that litigation a litigation between the same parties so as to make the decision in the probate suit a decision binding by way of estoppel?

I do not think that it is possible to contend successfully that Adelinda Concha would be conclusively bound by that determination of the domicil of the testator unless the appellant would also be bound by it, so that if the decision had been the other way Adelinda Concha might have relied upon that determination by way of estoppel as securing to her the rights which she claimed. Of course the executors had no personal interest in the matter. Their duty was only to administer the estate under the will, or if the law of Chili prevailed, to some extent outside the will. But the real and substantial controversy obviously was between the residuary legatee under the will and Adelinda Concha. It cannot be questioned that for certain purposes the executors do represent the legatees and the residuary legatee; and it may perhaps be admitted (at all events for the purposes of this case) that so far as regards all matters necessarily decided in a suit to which the executors are parties the residuary legatee and the other legatees may be bound by the decision. But I

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think that must be limited to the matters necessarily decided in the litigation to which the executors are parties, and that if the executors choose, as it is said here they have chosen, to obtain a decision of the Court upon a point which is immaterial for the purpose of determining the rights in question between the parties, they cannot by tendering for decision an issue which is unnecessary for the determination of the case bind all parties claiming under the will, legatees of whatever description, because that finding has been obtained in such a suit under such circumstances by the executors. That really is the present case. If the residuary legatee is bound here at all he is bound by a finding of the learned judge which was quite unnecessary for the determination of what he had to decide, and by a finding of the learned judge which therefore could not be successfully appealed against.

I think therefore that for these reasons the appellant, Trinidad Concha, if the finding had been the other way, would not in any way have been estopped; there would have been nothing to prevent his insisting before the Court which was to deal with the estate that the domicil was English and not Chilian. If that be so, I cannot see that Adelinda could any more be bound, as I have said, by the determination in the suit of an issue tendered by the executors but which was not necessary for the ultimate decision of that which the learned judge had to decide, which was solely this, are the executors entitled to probate of this will?

It is said that the litigation is a litigation between the same parties. Now I do not think that in the sense in which that language is used in the case of an estoppel it was really between the same parties so as to bind Adelinda. Mr. Charles cited to us cases for the purpose of establishing that this, by way of analogy, must be considered as a mere debt due from the executors to Adelinda, and that therefore it is a mere matter between Adelinda and the executors, just as the probate question was. I own that it does not strike me in that light. It may be that according to the law of some countries it may be sued for as a debt. But there is nothing to shew us what is the state of things according to the law of Chili, or how the matter is regarded there. It seems to me in truth to be a claim to which the child

is entitled under the law of Chili to have the estate pro tanto administered in a particular way; and I think that in the administration suit the executors had two rival claims to the administration of that estate; they had the claim, on the one hand, of Trinidad, the appellant, who said, "You must administer the whole of it under the will because I am the residuary legatee of a testator domiciled in England;" there was on the other hand the claim of Adelinda, who said, "You must administer part of it outside the will as being my property, and as to that there is no will, because with regard to that there was no power to make a will." Those two claims in the administration suit necessarily fell to be determined; and I think it would be erroneous to regard it as a mere question, like the question of an ordinary debt, between Adelinda and the executors, and to regard her as bound by a finding of the judge in the probate suit which was not essential to the decree which that learned judge pronounced.

Mr. Charles relied very strenuously upon the case of *Bouchier* v. *Taylor* (1), the only record of the reasons for the judgment in which is to be found in Hargrave's Law Tracts, pp. 472–476. I think that case is entirely distinguishable from the present. That was a case in which a Dr. Bouchier and Alice Merchant claimed to be the next of kin of the deceased, Alice Merchant claiming to be nearer akin than Dr. Bouchier. If she was nearer akin she was entitled to administration as against Dr. Bouchier. She died in the course of the litigation and her executors continued the litigation, and it was finally decided against them in favour of Dr. Bouchier. After that a residuary legatee under her will, who of course only claimed by reason of her will and could have no better or other claim than hers, sought, in a suit for the distribution of the estate in the Court of Chancery, to go behind the finding that Dr. Bouchier was the nearer relative, a finding in fact against the claim of Alice Merchant, and to allege that the finding in the Spiritual Court, as it then was, in no way bound him. This House held, reversing the decision of the Lord Chancellor and the Master of the Rolls, that he was in that case bound by the judgment of the Spiritual Court. But it is to

(1) 4 Bro. P. C. 708.

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be observed, first, that in that case the question as to which he was held bound by reason of the decision against his predecessor in title was the very point which had to be decided by the Spiritual Court. In the next place it must be remembered that at that time the Spiritual Court was a Court of distribution as well as a Court merely to determine the question of the validity of the testament and to grant probate or administration; it was a Court of distribution concurrently with the Court of Chancery. It was said there by the noble and learned Lords in this House that the decision of a Spiritual Court would determine that question for all purposes with which it had to deal; it would determine it not merely for the purpose of saying to whom administration should go, but it would also determine it for any subsequent question which would arise in the same cause with regard to the distribution of the estate. That finding would be a finding of the Spiritual Court for both purposes; so that it was impossible to hold that the Court of Chancery, being merely a Court of concurrent jurisdiction for the purpose of distribution, would not be bound by the finding of the Spiritual Court in a matter of distribution, a finding between the same parties on the very point which in each case had to be determined.

For those reasons that case seems to me to be wholly distinguishable from the present. The matter was dealt with very carefully in the judgment of Bowen L.J. in the Court below. I agree with the reasoning upon which he has proceeded and I do not think it necessary to add anything further than to move your Lordships that the judgment appealed from be affirmed, and that the appeal be dismissed with costs.

The other appeal which has been argued before us is a matter entirely independent of that upon which I have just expressed my opinion. It is an appeal from an order of the Court of Appeal of the 10th of March 1886, and the matter arose in this way. A suit was instituted in which a claim was made by Adelinda Concha to a large part of the testator's estate on the ground that it consisted of what are termed "gananciales" that is, as I understand it, sums which have been acquired by the husband and wife during the period of their matrimonial life, and to which therefore the children have a certain title. That claim being made by

Adelinda, the question arose whether she had a good title to the "gananciales," and that depended first upon the disputed question whether Juan José Concha had been validly married to her mother so that she was a legitimate child; and then of course the further question arose as to what was the amount of the "gananciales" acquired by her father and mother. Under the administration where that question arose, an order was made that there should be an inquiry first whether she was legitimate, and that all other inquiries should be stayed until that matter had been determined. Upon that evidence was offered by way of affidavit. The affidavits now in question were filed in 1879, and a commission having issued to Chili and Peru, witnesses were cross-examined upon those affidavits, but they were cross-examined only upon so much of their affidavits as related to the inquiry then ordered by the Court, namely, the inquiry as to the legitimacy of Adelinda Concha, and no cross-examination took place (I agree with the learned judges of the Court below, in thinking that it could not take place as the order stood) upon the further question dealt with in the affidavits, namely, as to the amount of the "gananciales," as to which the inquiry was ordered to stand over.

The inquiry as to legitimacy having been concluded in favour of Adelinda, on the 19th of July 1884 a further inquiry was ordered as to the amount of the "gananciales." On the 18th of November following, notice was given by the respondents of their intention to read the affidavits. Now it has not been disputed, and I think could not be, that it was perfectly competent for the respondents to give notice in that proceeding, in relation to that inquiry, of their intention to use affidavits which had been filed relating to the matter of that inquiry, and relating also to the matter which had been dealt with in the previous inquiry, both inquiries being in the same suit and with a view to the ultimate determination of the same right. Thereupon notice was given by the appellant on the 19th of February 1885 in these terms:—"Take notice that the defendants require to cross-examine (in addition to Fernandez Lopes de Lara already cross-examined) all the witnesses on whose affidavits you rely as evidence in answer to the second part of the first inquiry directed by the order made in this cause on the 19th

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day of July 1884, and notably the following;" and then a number of affidavits are mentioned, amongst others that of Julian Concha, upon which the present case is to be decided. A letter was written together with that notice saying that there had been purposely included pro formâ some witnesses who were supposed to be dead, in order that their deaths should be noted by the chief clerk, and that the reason for their not being cross-examined should appear.

It will be observed that the notice was a notice simply that the defendants required to cross-examine all the witnesses on whose affidavits the other side placed reliance, and specifying certain affidavits. There was no mention of time, or place, or occasion, and I cannot think that this notice was such a notice as is contemplated by the rules to which attention has been called. I think that a notice, to comply with those rules, should state the occasion or the place. The occasion may often be a sufficient indication of the place, but if they do not state the place, they should state the occasion on which it is sought to cross-examine the witnesses.

The rule relating to this matter, the most important of the rules to which we have been referred, is Order XXXVIII. rule 28. An earlier rule provides (and it has not been disputed) that an affidavit used at one stage of a suit may be used for other purposes at a subsequent stage of the same suit. But then it is stated in Order XXXVIII. rule 28, "When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination at the trial; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court or a judge." Then it is said that although that rule relates only to production at a trial, which it is admitted this was not, Order XXXVII. rule 21 provides that evidence taken subsequently to a hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at a trial, and that reading these two rules together they would be applicable to such a proceeding as

the present, namely, a hearing before the Chief Clerk or the Vice-Chancellor subsequent to the trial, for the purpose of working out the rights of the parties. I do not for a moment say that may not be the case; but if the analogy is to be followed and if the evidence is to be taken as nearly as may be in the same manner, and if you are to read rule 28 mutatis mutandis as applicable to such an inquiry, it appears to me that just as in the one case you must give notice for the production of the deponent at the trial, so in the other case you must give notice for his production on the occasion, whatever it is, on which the inquiry and hearing and determination are to take place and the affidavit is to be used. Now in the present case that was not done. It is said that it was not done because the witness was abroad. It may be that in a case where the witness is abroad that particular procedure would not be applicable; but if that procedure would not be applicable in such a case, it only shews that the case is not at all events within the terms of the rule. But then while that is admitted it is said that even if it be not within the terms of the rule there is an inherent right as a matter of justice to cross-examine a witness on any affidavit which he makes before that affidavit is used, and that the right is so absolute that unless there has been an opportunity of doing it the affidavit cannot be used at all. Now it may be that the Vice-Chancellor acted upon that view in directing that this affidavit should not be read, there not having been an opportunity of cross-examining. But when the matter came before the Court of Appeal it appeared that the appellant here had not first of all complied with the rule in terms, nor had he done anything as a substitute for a compliance with the rule in terms, doing the same thing as nearly as might be which the rule would have required him to do if he had come within its terms. It may be that he could have applied to the Court stating that the witness was out of the jurisdiction and could not be produced, but applying that nevertheless the affidavit should not be used without a commission issuing in order that he might have the opportunity of cross-examining him. The Court of Appeal have not shut him out from any such right.

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It appears to me, I confess, that this appeal is an idle one, that it does not deal with a matter of substance at all. The appellant has never been excluded from the right of cross-examination. The Court of Appeal have never decided that this affidavit is under all circumstances and in all events to be used even though he has had no opportunity of cross-examining. All that they decide is that under the circumstances of this case, and looking at the notice which he gave, and looking at his having taken no steps beyond giving that notice, they will permit this affidavit to be used unless he comes within a reasonable time; and they fix what they think, having regard to the delay beforehand, a reasonable time, namely a fortnight. They say, Unless you come within a fortnight and ask us to make the proper provision for the cross-examination of this witness we will allow the affidavit to be used. In substance it appears to me that the appellant has had all that he can possibly ask for. If it is a matter of discretion and judgment all I can say is that it appears to me that the Court below have exercised that discretion and judgment wisely and well. If it is not a case of discretion and judgment the appellant must shew an absolute right of which he has been deprived; he must be in a position to shew that the Court could not make the order for the reading of this affidavit. It appears to me that this case cannot be stronger than if it be within the terms of the rule, and if it be within the terms of the rule the Court has the fullest power in the matter. Mr. Brice has put particular cases in which he fairly admits that it has been done; but there is nothing in point of law to confine the Court to the particular cases to which he has alluded. We have not to determine the case as if the Court of Appeal had said, This affidavit shall be read without your having any opportunity of cross-examination though you desire it. They gave that opportunity and the appellant declined to avail himself of it. He must now shew that the Court acted without the power to do what they did, and this, as it appears to me, he fails to shew in this appeal. He does not shew that this affidavit has been ordered to be read without his having the opportunity of cross-examining.

It appears to me therefore that the judgment of the Court below on this point also is perfectly sound, and I move your Lordships that this judgment be affirmed and the appeal dismissed with costs.

LORD BLACKBURN:—

My Lords, these two separate appeals have been for convenience' sake united in one appeal. They are separate appeals, and depend upon quite separate questions. I have listened attentively to what the noble and learned Lord the Lord Chancellor has been saying, and I agree with his conclusion in each of the cases, but I will say a few words, and they will be only a very few, separately as to each.

As to the first of these appeals, the appeal on the supposed ground that it was settled by the decision of Sir Cresswell Cresswell—either because it was a judgment in rem, or because it was a judgment inter partes, and the parties were the same—that the domicil of Don Juan José Concha at the time of his death was in England, it, I think, is a mistaken notion that it was so settled, and that that was a judgment in rem. Upon that point I attach a good deal of weight, as simplifying the question, to the fact that by the Probate Act of 1857 the authority and power and jurisdiction in England of the judge of the Court of Probate, which Sir Cresswell Cresswell was at that time, were by the 23rd section very much cut down and were different from that which had been the jurisdiction of the Spiritual Court before. Speaking from memory (unfortunately I have not the section before me) he is to have the same jurisdiction as the Prerogative Court, but there is an express proviso that he is not to have any jurisdiction over suits for distribution. This is taken away from him, or rather is not given to him, although it had belonged to the Spiritual Court before. Now that, I think, makes a very considerable difference, when you look at it, as to what ought to be the effect of the judgment of Sir Cresswell Cresswell, the judge of the Probate Court, as being a judgment in rem in the sense in which it decides matters conclusively. That in my mind, takes away the applicability of the case of *Bouchier* v.

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Taylor (1), because Sir C. Cresswell when deciding, as judge of the Court of Probate, that probate should be granted to the executor of this will, had not to decide, and not only had not to decide but could not then or at any other time decide, what was the construction of that will, or what was its effect for the purpose of giving to legatees, or not giving to legatees. What he did decide was (and to that extent I think the decision was conclusive on everybody), that there was an executor who was entitled to have probate in England for the purpose of getting in and taking the property which was in England, and to that he was entitled if there was a will which made that executor a good executor according to the law of England; but I do not think that Sir Cresswell Cresswell had any power to say that the testator was or was not really a domiciled Englishman. If he had been a domiciled American, or domiciled in any other country, I do not think that a decision of the judge of our Probate Court saying: "I find him to be a domiciled Englishman, and therefore on that account grant probate," would be at all conclusive upon the Court of another country to oblige them to admit that he was a domiciled Englishman, when in fact he was not; or, putting it the converse way, that if a Chilian Court had chosen to say that some very wealthy man was a domiciled Chilian, and had therefore granted probate, the law of nations would require that to conclude any person from saying in this country that he was not so.

This is a part of the law which I think is very well expressed by Lord Cranworth in the case of *Enohin* v. *Wylie* (2). He says there: "The rules of law applicable to such a case" as he was then talking of "are, as I conceive, well-established. Personal property in this country, belonging to a foreigner or to a British subject domiciled abroad, can only be obtained, in the event of his death, through the medium of a representative in this country." He proceeds a few lines lower down to say, as reported, "In every case the succession to personal property will be regulated, not according to the law of this country, but to that of the domicil." It rather is that it is administered by the Court of this country according to the law of this country, and that it is to be adminis-

(1) 4 Bro. P. C. 708. (2) 10 H. L. C. at p. 19.

tered by ascertaining the domicil and the law of the domicil; but that is to be done by a Court of distribution, which the judge of the Court of Probate was not. He proceeds to say, after saying that personal property in this country in the case which he puts can only be obtained through the medium of a representative in this country: "If he has died intestate, administration will be granted here limited to the personal estate in this country. If he has left a will valid by the law of his domicil, and has thereby appointed executors, probate of that will must be obtained here," that is to say for the purpose of getting the property in this country, and it would be granted to the executors of that will if it was valid according to the law of the country and would be good here.

Now when we come to look at the present case it appears clearly enough that this testator, Juan José Concha, had been a Chilian by birth. He came to England, and would primâ facie not acquire an English domicil, but no doubt he might have acquired an English domicil. Whilst in England he was in the full swing of litigation with his brother and son-in-law (which in the Chilian law is not considered a stain and an impropriety) with respect to a large amount of property which was clearly in England. Those numerous suits which he was carrying on in the Court of Chancery here, relating to this very large sum which was in England, were clearly in themselves suits which as soon as he died could not be carried on without a personal representative in this country. It is equally clear that it was proper for the judge of the Court of Probate to grant probate to the executor of his will if that will was such as to appoint a valid executor in this country. Now it was quite immaterial, for the purpose of so doing, what his domicil was if the judge of the Probate Court was satisfied that probate should be granted. Everybody now is agreed in the fact that Juan José had acquired no domicil where he was. It is quite clear that if he had either acquired an English domicil or a Chilian domicil the only two laws which were at all material were that of Chili, and that of England, which was where he was at the time when he executed his will; and whichever was his domicil, if his will was a good will, valid to the extent of appointing an executor according to the formalities of

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either of those countries, it was quite enough to make it the duty of the judge of the Probate Court to grant probate to that executor whether the testator had been domiciled in England or in Chili.

Now that being so, the executor proposing to prove the will there was a caveat entered, and it is said that Sir Cresswell Cresswell (I think there must be some mistake about it—however, it is asserted) did really enter into an inquiry as to whether or not the testator was domiciled in England, and found that he was; and it is said that upon the caveat in the suit an order was drawn up, which may perhaps not mean that, but which does look extremely as if the registrar entered the judgment that the judge did find it. I cannot think that if he had done that it would have bound everybody universally as being a judgment in rem. I have instanced a sort of illustration of it. Supposing he had done so, and supposing that he was wrong and the fact was that the testator had not been really domiciled in England but had been domiciled, say, in the United States, in New York we will suppose, could it possibly have been said that the Court of New York (which undoubtedly would have the same general law of nations as we have, following the law of the domicil to distribute the property) would have respected the decision of the Judge Ordinary, it establishing that this will was proved conclusively as being enough to make this person executor and the representative in England to obtain the English property—could it have been said that the Judge Ordinary having erroneously found that the testator was domiciled in England when in fact he was a domiciled citizen of the United States, it was to conclude them and conclude everybody to the fact that he was a domiciled Englishman until a foreigner had come to the Court of this country to obtain a reversal? I cannot think so. If that was so, how could it as a matter in rem be decisive as regards the reason upon which the judge of the Probate Court had gone? I cannot think that it would be.

The case to which I have already alluded of *Bouchier* v. *Taylor* (1) seems to me to have gone entirely upon the ground that the Spiritual Court who there decided was a Court not merely to

(1) 4 Bro. P. C. 708.

decide who was to be administrator in the limited sense which I have put upon the decision of the judge of the Probate Court, but was also a Court having full authority to decide the final question of how the property was to be distributed; and it was on that ground that the Court of Chancery was held there (I do not know exactly and have not looked enough into the case to see to what extent and degree) not to have a right to overrule a decision of the Spiritual Court. It may be that that is a very good rule; but that can have no application here, where the judge of the Court of Probate had no jurisdiction to decide what was to be done with the residuary sum of the testator's property after all creditors who had a right to come upon it had been sufficiently paid off. He had no jurisdiction to decide that—that would be done by the Court of Chancery now—it could not be done by the Court of Probate. That being so, I think it is quite clear that this is not a decision in rem which would bind anyone.

Then it is said that though that is so it was a case inter partes, that the same parties were litigating the matter afterwards; and no doubt, without its amounting to anything in rem or being an estoppel in that sense, you may be concluded by its being res judicata as between the same parties. That however is reduced to a comparatively very narrow point. It is a matter so much more within the practice of the Equity Division that I simply say that I quite agree with what seems to be the opinion of the Court of Appeal; and consequently upon all these grounds I thoroughly agree with the motion which has been made by the Lord Chancellor and I have nothing to add.

As to the second appeal I think I had better say nothing more than that I agree also, except to say that I cannot agree with the general proposition which was laid down that every piece of evidence before it can be received must have been cross-examined upon. Most pieces of evidence (not by any means all) are not received unless there has been an opportunity of cross-examining upon them. In this particular case it seems to me that there was a perfect opportunity for the other side to cross-examine if they had come forward in proper time and with proper speed to ask that they should cross-examine. As to whether or not it was a judicious thing originally to limit the commission which was

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sent out to one set of questions only, which was done with the view of saving expense, or whether it would not have ultimately prevented a great deal of waste of money and time and delay if it had not been so limited, I say nothing—I have no doubt that it was done with a perfectly honest intention; but it was so limited and nothing was done to set it right. A commission might have been applied for afterwards for this purpose. It was delayed so much that it was not reasonable to delay further; and it is quite true that when an offer was made (I do not at present say whether it was a reasonable offer or not) Bowen L.J. said, "You must remember this, that if you refuse a reasonable offer and go on in the same way you may be ordered to pay costs." I have very little doubt that that had no small effect and that they would not ask for this commission because they were afraid that they themselves would have to pay all the costs of sending it out to Chili, which I dare say would be a very effectual preventive to sending it out. I cannot speculate upon that. It is enough to say that as it stands the order of the Court of Appeal with the conditions attached to it seems to me perfectly right, and I therefore agree with the motion of the noble and learned Lord.

LORD BRAMWELL:—

My Lords, I am of the same opinion as the two noble and learned Lords who have addressed your Lordships. For my own part I thought that Mr. Charles had made considerable way in proving that the parties to the present litigation ought to be treated as though they were Adelinda and her husband on the one side and the executors on the other, upon the ground that Trinidad was in the place of the executors, because he was either claiming through them or under them, and consequently was neither better nor worse off than he would have been, and that Adelinda was neither better nor worse off than she would have been, if the executors had been parties instead of Trinidad. But it is not necessary to determine that, because supposing that it were so I am clearly of opinion, for the various reasons which have been given by my noble and learned friends and for the reasons given in the judgment of Bowen L.J., that this was not a

matter of estoppel or res judicata or any other matter which could not be tried again between the parties. And I think that that is shewn to demonstration by a matter which was mentioned by the noble and learned Lord on the woolsack, namely that no appeal was maintainable against the finding of Sir Cresswell Cresswell as to the domicil. It may possibly have been that the reason which he gave for his judgment was a bad one, but even supposing that it was a bad one no appeal would lie as to that finding.

Then as to its being said that the issue was an issue found between the parties, in my opinion a similar remark applies to that. No specific judgment could be pronounced upon that issue nor was it. It was a general judgment (at least in my opinion it ought to have been a general judgment) that for various reasons appearing in the judgment probate ought to be granted; and the same remark applies, namely that the finding upon the issue as to the domicil could not have been appealed from.

So much for the first subject-matter of appeal. With respect to the other I am very much in the situation of my noble and learned friend opposite—probably the less I say about it the better. It appears to me, as well as I can understand this question, that the appellant has not complied with the practice—that he has not taken the step which he ought to have taken, in the form in which he ought to have taken it; and even if he had done so it seems to me upon the rules that there is a discretion in the Court, which in my opinion has been reasonably exercised. I doubt whether the cross-examination of these witnesses was a matter about which Trinidad had any great care. I am inclined to think so for a variety of reasons, amongst which there is this, that Trinidad or those who represented him (I mean his legal advisers) did not make the application which it was left open to them by the order of the Court of Appeal to make. Why did not they make that application? It would not have prejudiced their appeal here. They might have said, We make this application quite consistently with our going on with the appeal, for it may be that that appeal will be decided against us, and therefore as matters at present stand we make the application. They did not think fit to do it, and I dare say it was because they

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did not care much about it; for although the evidence no doubt is of importance it is evidence which I should think is more likely to be met by contrary evidence than by cross-examining the witness who has made the statement.

I therefore concur in the proposal of the noble and learned Lord on the woolsack with regard to this as well as with regard to the first mentioned appeal.

LORD FITZGERALD:—

My Lords, upon the main point of the case I entirely concur, both for the reasons given by Bowen L.J. in the Court below, supplemented as they have been by the Lord Chancellor, and for the very weighty reasons coming from my noble and learned friend opposite (Lord Blackburn), that is as to the effect of the finding in the decree of Sir Cresswell Cresswell with regard to the domicil of the testator. I think that there has been no estoppel in any direction there. All that Sir Cresswell Cresswell could determine by his decree would have been what I suggested in the course of argument, namely, having regard to the terms of the statute, first the validity of the will, secondly its contents, and thirdly that the executors of that will were the persons entitled to probate; and beyond that he was not called upon to decide anything whatever. If he had never expressed an opinion one way or the other upon the subject of domicil, his decree nevertheless would have been the same, I mean in result though not in form, as that which is brought before us.

I am therefore of opinion that taking it as a proceeding in rem there is no estoppel of any kind; and when you come to deal with it as a finding inter partes the obvious answer to it is that Trinidad was not a party to that suit—he was then an infant. The decision, which was not necessary to the case before Sir Cresswell Cresswell, did not and could not bind him. It is a part of our law as to estoppel that an estoppel to be effective must be mutual. It would not bind Trinidad, he not having been a party to that suit, and therefore there is no estoppel inter partes. I therefore concur in thinking that the main appeal should be dismissed.

I confess that as to the other question I have some difficulty, and did in the course of the discussion entertain some difficulty.

I suppose it is from my not comprehending the Rules that I have been unable to discover that there is any one of the rules or orders which applies to this particular case. They all seem to me to be based upon this, that you are entitled by notice to call on your adversary to produce for cross-examination the witnesses whose affidavits he is using and who are witnesses under his control, and whom he can compel to appear. One of the subsequent orders shews that it is limited in that way; and I have been entirely unable by dovetailing one rule into another to come to the conclusion that there is any rule directly and in terms applicable to the case before us, and I proceed to consider the case as if there was no such rule. Undoubtedly the practice of the Court of Chancery has always been to receive evidence by affidavit; but it is always guarded in this way, that if a party tenders evidence by affidavit he ought in some shape or other to afford to his adversary an opportunity for the cross-examination of the deponent; and it is clear to me that as yet that opportunity has not been given to Trinidad. Now it is true that he moved for the commission of 1882, but the inquiry then was limited to another subject, a subject of common interest to all, that is, whether Adelinda was legitimate or illegitimate. If she was illegitimate it potentially put an end to the litigation; if legitimate then other consequences arose. Accordingly the cross-examination which was provided for by that commission was limited to that inquiry. I have looked into the cross-examinations, and I find that no question was put beyond that. That point was determined in her favour. Then she assumes a different character, she becomes an actor to establish her right, founded upon her legitimacy, to the gananciales which she derives through her mother, an item of very considerable amount, and it is upon that right that subsequently notice is given upon her behalf, and for the first time given, to use those affidavits as evidence with reference to the proper amount of the gananciales which she seeks to recover.

I should be very sorry to dispose of this case upon mere formalities or non-observance of directions and rules as to the form of notice; but there is the broad question whether Trinidad ought now to be affected by evidence given in his absence by a

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deponent who only gives it by affidavit,—evidence materially and largely affecting him, and which certainly he has not, up to the present moment, had the opportunity of testing by cross-examination.

Now the materiality of the evidence will be shewn by this: the gananciales are now to depend upon the evidence as to the law of Peru, and also the question of amount. We will take the affidavit of Don Julian Concha, the one brought before us, and it contains this clause. After stating that his brother told him of his realizing during his married life property to the amount of $1,700,000 he says, "My said brother Don Juan José Concha informed me that the whole of his fortune had been made during the lifetime of his wife and first cousin Dona Maria Concha, that she was a woman of great talent, and that he was indebted to her for a great part of his fortune." That is the very foundation upon which this law as to the gananciales rests. That statement is made, and every word of it Trinidad ought to have an opportunity to cross-examine about. This affidavit is filed in the Court, and a part of it only has been used, that part of it applying to the legitimacy question. Up to the time of this appeal it was never used to establish either the amount of or the right to the gananciales.

My Lords, I should have had great difficulty upon this question in upholding the decision of the Court of Appeal, but I see another ground upon which it may be rested. After all, this affidavit is in evidence, and it is a matter of judicial discretion in the Court to determine how and in what manner Trinidad shall have an opportunity of cross-examination. What the Court said is this:—You had a commission in 1882—you applied for and obtained that commission—under it you did not cross-examine as to this matter but we will give you an opportunity of doing so—we will pronounce in favour of the admissibility of this document; but we are bound to do another thing, we are bound to see that there is no abuse of the process of the Court—we are bound to see that delay is not created for another object—we are bound to see that the powers of the Court are only used to advance justice; and therefore we hold in our own hands the power to direct by whom this commission should be sued out and

prosecuted, and we offer to you the opportunity of coming within a fortnight, and if you can satisfy us that your application is bonâ fide, that it is not (as Lord Justice Fry says) a mere blocking of the course of the cause, but that you really want this cross-examination as to this very material affidavit, come in a fortnight and we will determine whether you are to have it and upon what terms. I cannot say that that was not within the judicial discretion of the Court of Appeal. They have exercised that discretion possibly in a way that I should not have done myself. I should rather have thought that there was a matter approaching to an abstract right on the part of Trinidad to say, These are all witnesses under your control. You are to produce them for my cross-examination, and I ought not to be driven to a commission under which unless I have your assistance I have no means of compelling the attendance of the witnesses to be cross-examined.

The case to my mind is not very clear—it is not free from doubt—but my doubts are not so very strong that I should venture to dissent from the opinions of judges of so much weight and experience. I may point out too that it is necessary to be very cautious in this case having regard to the nature of the litigation. There are I think no less than eight Chancery suits in existence proceeding pari passu, including the three instituted by the testator himself and twice revived since his death; and as the Vice-Chancellor well says, thirty years have elapsed since the earliest of them was instituted, and he sees no reason why thirty years more or twice thirty years should not elapse before a final decision is come to. That shews the great necessity for not interfering with the exercise of judicial discretion.

LORD ASHBOURNE:—

My Lords, I entirely agree with the conclusion at which your Lordships have arrived, and I am very glad to think that nothing has happened in this hearing and nothing has fallen from any of your Lordships to give any encouragement to an undue protraction of this litigation. I do not think it necessary to say anything beyond what has fallen from your Lordships upon the first and main appeal, except to read a short passage from the judg-

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ment of Lord Justice Bowen (1): "The scope of the probate suit is to establish that the will was executed in conformity with the law of the country of domicil, wherever that country was; but if it is not necessary for the purpose of such a suit to establish an English domicil more than a Chilian, the executors could not either by litigating an incidental question, or by admissions they may choose to make about it, conclude the residuary legatee as to the extent to which the testator's will when proved will operate on property alleged by an adverse claimant to be outside his power of testamentary disposition. And as the residuary legatee could not be bound under such circumstances by a decision against the executors as to domicil, he cannot, since estoppels are mutual, treat as binding a decision in their favour."

My Lords, on the second matter I cannot say that I entertain any of the doubts just stated by my noble and learned friend. I am by no means satisfied that in this case with reference to the form in which he appeals the appellant has any great claim for sympathy. I do not like to say that I think there are grounds upon which a person might arrive at the conclusion that he desired to gain time. I satisfy myself by saying that I concur in the observation of Lord Justice Fry, that this notice to cross-examine was ridiculous—it was idle in point of substance, and to my mind, adopting the words of Lord Justice Fry again, it was substantially wrong in point of form.

Orders appealed from affirmed; and appeals dismissed with costs.

Lords' Journals 26th July 1886.

Solicitors for appellant: *Ward, Mills, Witham & Lambert.*
Solicitors for respondents: *Worthington, Evans, & Blaxland.*

(1) 29 Ch. D. 304.

[HOUSE OF LORDS.]

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1886
July 30.

THE MARINE INSURANCE COMPANY (LIMITED) . . . . . } APPELLANTS;

AND

THE CHINA TRANSPACIFIC STEAM-SHIP COMPANY (LIMITED) . . . } RESPONDENTS.

Insurance (Marine)—Warranty "free from average under 3 per cent."—Particular Average Loss, Mode of ascertaining—Indemnity to Assured.

A time policy on ship contained the warranty "free from average under 3 per cent." During a voyage covered by the policy the ship sustained (without its being discovered) a fracture of her stern-post owing to perils of the sea, being a particular average loss within the policy. The voyage having been completed and the cargo delivered the ship was put into dry dock for the purpose only of being cleaned, scraped, and painted, being in such a state that no prudent owner would have put to sea again without having her cleaned and scraped. When the ship was put into dry dock the injury was for the first time discovered, and the necessary repairs were then effected, and the ship was discharged from dry dock on the eighth day, repaired, cleaned, scraped, and painted. Had she required nothing but cleaning, scraping, and painting, she might have been discharged on the evening of the third day. The repairs alone, without cleaning, &c., would have taken the whole eight days. If the whole or half of the dock dues for the first three days ought to be charged against the underwriters in account there was a particular average loss exceeding 3 per cent. If the cost of the repairs plus the dock charges for the last five days were alone to be charged against the underwriters, there was not a particular average loss of 3 per cent. If the dock charges for the first three days ought to be attributed partly to the repairs and partly to the cleaning, &c., then (so far as the apportionment was a question of fact) it was to be taken that one half of those charges should be attributed to each purpose:—

Held, affirming the decision of the Court of Appeal, that although a contract of marine insurance is a contract of indemnity, and though the result would be that the shipowners would be relieved of part of the dock charges which they would otherwise have had to pay themselves, they were entitled to have the dock charges for the first three days apportioned between the repairs on the one hand and the cleaning, &c., on the other; that the apportionment should be one half to each purpose, and that there had therefore been a particular average loss exceeding 3 per cent.

APPEAL from a decision of the Court of Appeal.

The respondents having brought an action against the appel-

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lants, the following special case was stated by Gully Q.C. to whom the action was referred.

1. By a policy of insurance, dated the 2nd April 1874, the plaintiffs caused themselves to be insured by the defendants upon the hull of their steamship *Vancouver*, valued at £70,000, for twelve calendar months ending on the 1st of March 1875. In this action the plaintiffs sought to recover a particular average loss under the policy. It was declared by the policy that the ship should be, and was, warranted free from average under 3 per cent., unless general, or the ship were stranded; and the defence was that the loss in question did not amount to 3 per cent.

2. In February 1875 the *Vancouver*, whilst on a voyage from Hong Kong to San Francisco, encountered very heavy weather, and her stern-post was then broken by the sea causing a leak in her after-compartment. The fracture of her stern-post was not known or suspected at the time it occurred, nor until she was in dry dock, as hereinafter mentioned, and the leak was attributed to other causes. She sustained at the same time some other slight damage by perils of the sea. On her arrival at San Francisco on the 18th February the cargo was discharged, and she then ceased to make water.

3. At the time when the said damage was incurred the vessel had a very foul bottom, which so much affected her speed that no prudent owner would have sent her to sea again without having her first scraped and cleaned, and it may be taken as a fact in the case that she would not have put to sea again after her arrival at San Francisco on the 18th February without being first put into dry dock and then scraped and cleaned.

4. The *Vancouver* lay in San Francisco Bay without employment until January 1876, when her bottom having become excessively foul, her owners, the plaintiffs, determined to put her into dry dock for the purpose of having her cleaned, scraped, and painted, and for that purpose only.

5. The *Vancouver* was put into the graving dock at San Francisco on the 4th January 1876, and on the afternoon of that day a survey was held upon her as soon as she was dry, with a view to examining the state of her bottom and of the coating under water. The surveyors then discovered that her stern-post

was broken about thirty inches above the keel and recommended its repair. It was accordingly repaired in dry dock with all reasonable speed and economy, and the vessel was discharged from dry dock on the 11th January, repaired, cleaned, scraped and painted.

6. Had the vessel required nothing but cleaning, scraping and painting she might have been finished and discharged by the evening of the 6th January, and the dock bill would then have amounted to $3,292.37, made up as shewn in paragraph 7. On the other hand, if she had not required cleaning, scraping, or painting, but had gone into dock solely for the purpose of surveying and repairing the fracture of the stern-post she would have required the whole time from the 4th to the 11th January.

7. On the voyage, which terminated at San Francisco on the 18th February 1875, the *Vancouver* sustained a particular average loss of £558 15*s.* 0*d.*, irrespective of dock dues. The dock charges at San Francisco were as follows:—

January 4th (and 5th) . .	$2,192.25
January 6th	1,096.12
Horse and man	4.00
	$3,292.37

The charges from January 7th to the 11th (both inclusive) were $6,567.74. The two sums together amounted to $9,869.11.

8. The plaintiffs contend that the warranty contained in the policy has been satisfied by reason of there having been an average loss of 3 per cent., and that for the purpose of determining whether there has been such loss, they are entitled to bring into account, either—

(1.) The whole cost of docking the ship, i.e. $9,869.11; or

(2.) If not the whole cost, then, at least, the whole cost less a part of the sum of $3,292.37, the cost incurred up to the evening of the 6th January.

If the second contention is correct, and if the $3,292.37 ought to be attributed partly to repairs and partly to cleaning, scraping and painting, then (if and so far only as the apportionment of that sum is a question of fact), it may be taken that one-half of that sum (or $1,646.18) should be attributed to each purpose.

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If either the whole of the dock bill, or the whole of it less $1,646.18, ought to be charged against the underwriters in account, then there has been a particular average loss under the policy exceeding £2100, which is 3 per cent. on £70,000, the value of the hull.

9. The defendants on the other hand, contend that the *Vancouver*, at the time when her stern post was fractured, was already in a condition which made docking for the purpose of cleaning, scraping and painting a necessity, and that (1) no part of the sum of $3,292.37, or (2) no part at least of the first item ($2,192.25) of the dock bill can be brought into account against the underwriters in order to bring up the average loss to 3 per cent. If the defendants' contention is correct, then there has not been a particular average loss of 3 per cent.

10. The question for the opinion of the Court is whether or not the warranty contained in the policy has been satisfied by reason of there having been a particular average loss of 3 per cent.

The Queen's Bench Division (Pollock B. and Manisty J.) entered judgment for the defendants upon the special case.

The plaintiffs having appealed, the following judgments were delivered by the Court of Appeal on the 8th of July 1885.

LORD ESHER M.R.:—

In this case the policy is on a ship valued in the policy, with a clause that in case of an average loss, if the loss is under 3 per cent., or does not exceed 3 per cent., the underwriter is not to be liable. It is admitted that an average loss has occurred by reason of damage to the ship by a sea peril. That loss has been repaired, and it is not denied that all that was done in the repair of the loss was reasonably done. The question is, whether by reason of the clause in the policy the underwriter is nevertheless free, because it is alleged that the loss did not amount to 3 per cent. as compared with the value of the ship named in the policy. The way to find out, to my mind, whether the loss amounts to 3 per cent. or not within the condition, is to find out what the loss is, irrespective of any consideration of the 3 per cent. clause. If you find that the loss to the assured would have been less than 3 per cent. as compared with the value in the policy, the under-

writer is not liable at all. If you find that the loss exceeds 3 per cent., then the condition is fulfilled, and the underwriter has to pay the whole of the average loss.

Therefore the question here must be, what was the loss to the assured in respect of the sea damage, considering it as if the 3 per cent. clause was not in the policy; that is, we must arrive at what was the real loss first.

Now, in this case, the loss was a damage to the ship, and that damage has been in fact repaired. The question is, what did these repairs cost to the assured—what did he pay for them? Because given the other matters, that is to say, that the repairs were reasonable in amount, and that the charge for them was a reasonable charge, this charge, if nothing else interferes, is the amount of the loss to the assured by reason of the damage done by sea peril. It has been urged that by reason of a joint operation occurring in a dry dock, so much of what was done as was not to cure the damage by sea peril, is to be a salvage in the hands of the assured of which the underwriter had the right to take advantage. I cannot see it; it has nothing to do with salvage. The salvage which an underwriter is entitled to take account of is this: where the underwriter pays the whole loss, and the assured by reason of that circumstance obtains an advantage, that is salvage; but nothing which goes to ascertain or contribute to what is the real loss is salvage at all. The question of salvage does not arise until the question of the liability of the underwriter is determined.

The difficulty in this case arises thus: in order to repair the damage to the stern-post, it was in fact necessary that the ship should go into a dry dock. The ship had a foul bottom, which had not been caused by perils of the sea. It was equally necessary that she should go into dock for the purpose of curing that defect, if it was to be cured, and she did in fact go into the same dry dock for that purpose. That there was any duty, that is legal duty, to the underwriter on the part of the assured to take his ship into the dry dock in order to clean her bottom, cannot be maintained here. The warranty of seaworthiness was not to be considered. It did not apply to the port of San Francisco. Therefore this cleaning of the ship, so far as the underwriter was

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concerned, was a thing the assured might or might not do. It is found that for his own benefit any reasonable shipowner would have put the ship into dock and cleaned her bottom before she went from San Francisco. But that is wholly in respect of his own interest, and not in respect of any duty to the underwriter. Still, she was put into dry dock, and was put into the dock for the purpose of having her bottom cleaned. It is said, and it is true, that at the time she was so put into the dock, she was put in solely for that purpose, and with that intention; and it is urged that although the dock was used for another purpose also, yet that the first payment is a payment for the privilege of going into the dock. It seems to me that is a wrong view. What you pay for when you put your ship into dry dock is the use of the dock, and different modes of payment for that use may be established by the contract between the dock-owner and the shipowner. It may be that he will charge so much per day. It may be he will charge a lump sum, and so, however long you take to repair your ship, you will pay that lump sum. It may be that you pay a considerable sum on putting the ship first into dock, and so much per day afterwards as long as she may be in the dock, but whatever the sum may be, I venture to say every farthing of it is payable for the use of the dock. What the one has to sell is the use of the dock; what the other wants to buy is the use of the dock; and the mode of arriving at the payment makes no difference. All is for the use of the dock. Then you have the question, What was this dock used for? It was used by the shipowners for doing two distinct repairs on two separate transactions, one for cleaning the bottom of the ship, the other for repairing an injury that had been done to the ship. So long as the ship was in the dock for either purpose, supposing that either purpose had stood alone, she would have had to pay the whole sum in respect of the dock, however long she was in it. Supposing the ship had gone in and had only cleaned her bottom, for every day she was in the dock for that purpose she would have had to pay the whole sum. If the ship had gone into the dock for the purpose of repairing the stern-post only, she would, for every day she was in, have to pay the whole of the dock dues. The use of the dock whilst both these transactions were going on

on board the ship at the same time, was not increased or diminished in the least by the increase of the work done on the ship during the same time.

Now the question seems to me to be reduced to this. How much of the payment for the dock would be attributed as a matter of business to the use of the dock for the one purpose, and to the use of the dock for the other? Inasmuch as the burthen on the dock is not increased by either, inasmuch as the advantage to each of them is the same, it seems to me that any man taking a business view of the matter, would say, as there is a particular sum for the use of the dock to be paid for the two purposes, and the burthen on the dock is not increased by the two transactions going on together, but the advantage to the two persons is equal, supposing they had to be carried on by different persons, those different persons ought to pay half the expenses whilst the dock was being used equally by both of them. Whenever it is used, it is used equally by both of them, although the repairs of the one kind might cost far less than the repairs of the other. Supposing the repairs to the stern-post in twelve hours, by reason of the wages of engineers or skilled workmen, would cost three times as much as the repair by cleaning, nevertheless the use of the dock is equally useful to each party if they were two separate parties. If that would be so, if there were two separate parties, it makes no difference to my mind that both the transactions are by the one party. If he had to divide what it had cost him in respect of each, he would deal with the matter in the same way as if each of those things had been done by separate people, or by himself and another person. You cannot shew that money was paid for either particular purpose because the same man has paid for both; but the true way to treat it is to say, as a matter of business, that he paid during the same number of days in which both operations were going on half the dock dues in respect of one operation and half the dock dues in respect of the other. Therefore, during the earlier days of the transaction here, half the dock dues were paid in respect of the repairs of the stern-post and half the dock dues were paid in respect of the use of the dock for the cleaning of the ship. The dock dues are certainly part of the cost of the repairs if nothing

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else happens; the cost of the repairs is the cost of the workmen upon the ship, and the materials, and all the payments for the use of the dock, which is a necessary preliminary to being able to do the other work. Therefore, if half of these dock expenses during the common days is paid by the shipowner in respect of the repairs to the stern-post, that half is part of the cost of repairing the stern-post, in other words, is part of the cost of repairing the loss which was occasioned by the sea peril; and if that half is to be so attributed, then what this shipowner paid for repairs was larger than 3 per cent. of the value of the ship in the policy. The condition is satisfied, and the underwriter is liable to pay the amount of the average loss. Under these circumstances, I cannot agree with the judgment of the Divisional Court, and I think that the underwriters in this case were liable for the average loss, calculated in the way that I have stated.

BAGGALLAY L.J.:—

I regret that I am not able to take the same view of this case as has been taken by the Master of the Rolls, and as I gather that my Brother Fry agrees with the Master of the Rolls, my dissent cannot be of much or any importance; but I think it right to state what, in my opinion, is the proper way of dealing with the case.

The question is, has there been a particular average loss above 3 per cent.? It is admitted that an average loss of 3 per cent. will be £2100. It is further admitted that there had been a particular average loss which, irrespective of dock dues, amounted to £558 15*s.*; and what we have to consider is, what is the amount of dock dues, or what is the proportion of those dock dues which ought to be attributed to the repair of the ship. I agree with what the Master of the Rolls has said, that we have first to consider the amount of particular average loss, irrespective of the question whether it does or does not exceed the amount of 3 per cent. [After stating the facts in paragraphs 2 to 6 of the special case his Lordship proceeded:—] It is contended on the part of the defendants they ought only to be charged with the excess in the amount of dock dues beyond that which would have been due to her being in dock simply for the

purpose of being cleaned and painted, and nothing more done, and they also say if they are not entitled to make that demand, at any rate they are only to pay the excess beyond the expenses of the first two days, or what were called the preliminary expenses of going into the dock, a minimum price of something over $2000. On the other hand, the plaintiffs contended that the whole cost of docking the ship, a docking which had been had recourse to in the first instance for the purpose of cleaning and painting, ought to be paid by the underwriters. I think the true view of the case lies between these two extreme views, and I do not understand that the Master of the Rolls took otherwise than that view of the case also. He considered there ought to be an apportionment upon some principle or other of the dock dues as between the two contending parties. Then we have this additional fact. If that ship had only been cleaned and painted when in dock, and that had been done in the usual and proper manner, the dock dues payable in respect of the work would have amounted to $3292. On the other hand if she had been taken into dock only for the purpose of repairing her stern-post, and that only had been done, and done with proper expedition, the cost would have been the whole amount of $9869, which would be the amount which had to be paid on this occasion. Now it is clear that if the plaintiffs escape further payment of any portion of the $3292, which they would have had to pay if the ship had only been cleaned and painted, it is only by throwing a portion of the payment which they would otherwise have to bear themselves, upon the underwriters. That I think is a matter which may be taken into consideration. I think it unnecessary to go into a long discussion of the details, but it appears to me the right course is this. The shipowners have to pay all the expenses of cleaning and painting; the underwriters have to indemnify the shipowners in respect of all expenses of actual repairs. Then how are the dock dues to be paid? It appears to me that the fair and equitable way, as between business men, of apportioning the dock dues, would be this; apportion those dock dues in the proportion in which each would have to be paid if the one purpose alone had to be carried out. In other words, that would be

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in the proportion which $3292 (which would have been the total cost if you had only been cleaning and painting) bears to $9869, which is the total dock dues which would have been incurred if the repairs only had been done. It so happens that within a couple of dollars those are exactly the proportions of one to three; and, therefore, if you divide the aggregate amount of $9869, and take the whole amount of dock dues between the two parties in the proportion I have mentioned, namely, the amount of dock dues which would have had to be paid in respect of each service alone, you would then have in respect of the cost to be borne by the owners of the ship in respect of the cleaning $2467, and by the underwriters in respect of the share of the repairs, three-fourths, namely, $7400. If this be the proportion which each party would have to bear, it would not differ very much from the actual figures arrived at of the learned judges of the Court below. It would have the same practical result, making the amount of the alleged average loss fall short of the 3 per cent. As I have already pointed out, any other conclusion such as has been suggested and urged, would, it seems to me, amount to this, that the shipowners throw upon the underwriters a portion of the expenses which, under other circumstances they would be undoubtedly liable and bound to pay, by reason of the two processes of cleaning, painting, and repairing going on together. Regarding a policy of insurance as a mere indemnity, it appears to me that the shipowners ought only to be indemnified to the extent to which they have been put to an extra cost.

FRY, L.J.:—

I never differ from a conclusion of my learned Brother Baggallay without doubt.

In the present case I am unable to concur with him in his conclusions, and I agree with the view which has been expressed by the Master of the Rolls. It appears to me, as a general rule, that where there is a partial loss in consequence of an injury to a vessel by reason of perils insured against, and the insured does the repairs, that there the sum which the assured is entitled to recover, is the amount properly expended in executing

the necessary repairs. Therefore the only inquiry we have now to deal with is, what was the amount which is to be deemed to have been properly expended for executing the necessary repairs?

With regard to a certain portion of this amount there is no controversy, and the only difficulty arises with regard to dock dues. The reason why I am unable to follow my Brother Baggallay in his conclusions is this; it appears to me we have nothing to do with that portion of the time in the dock which is to be attributed entirely to the repairs of the stern-post, and that the only subject of apportionment is the dock dues for that portion of time which would have been occupied in common in doing the repairs to the stern-post and in cleaning the bottom of the ship, which has been found to be three days. Then, confining myself, as I feel bound to do, to those three days, the question is, what proportion of those dock dues ought to be attributed to the one operation or the other. Now, although it is quite true that the insured are carrying on the two operations together, yet they may fairly be treated as if they were separate persons, because the insured are carrying on one operation at their own expense and risk, and they are carrying on the other operation with a right to be indemnified by the underwriters. Where the circumstances are such that there are two persons, each of whom has a distinct object in view, which he can only accomplish at a certain expense, and if both these persons concur together, they can each accomplish their separate object at the same expense as would have been incurred by each of them if they had done it separately, there it appears to me, the simple ordinary rule—the rule of justice and equity—is, that the total expense which has been incurred by their doing their acts together, and which would have been incurred by each if they had done it separately, shall be divided between them. This appears to me to be one of the cases to which the well-known maxim that "equality is equity" applies; and, therefore, treating the assured in the present case as if they were two persons, it seems to me the reasonable thing is, to attribute one moiety of the dock dues for the three days to the enterprise of cleaning the bottom of the ship, and the other moiety to the enterprise of repairing the stern-post. That being so, I am unable to agree with the conclusions of the learned

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judges of the Court below, and I think that the order the Master of the Rolls has indicated is the right order.

Judgment reversed, with a declaration in respect of paragraph 10 *of the special case that the warranty contained in the policy had been satisfied by reason of there having been a particular average loss of* 3 *per cent.*

From this decision the defendants appealed.

July 12, 13. Sir *C. Russell* A.G. and *J. Gorell Barnes*, for the appellants:—

The appellants contend that the underwriters are not liable for the cost of taking the vessel into dock, or any part thereof. That cost ought to be charged to the purpose for which the vessel in fact went into dock. When the stern-post was broken the ship's value was already depreciated. Suppose the vessel had gone into the floating dock in the ordinary course to discharge her cargo, and when the vessel was lightened some damage (previously concealed) had been discovered which could be repaired in the floating dock; it would be unreasonable to charge the underwriters with the cost of taking her into the floating dock or of discharging the cargo in order that the damaged part might be above water. There is no difference in principle between such a case and the present. The underwriter is entitled to any advantage in point of economy which results from the vessel being in a certain position, when that position comes about in the ordinary course. Even if the damage had been discovered before the *Vancouver* went into the dry dock the underwriters would still not have been liable. The question is not what has the shipowner had to pay, but what has been his loss? The underwriters are liable for the extra time made necessary by the repairs and for the actual cost of repairs, and nothing more, the contract of assurance being only one of indemnity. The state of the vessel when the fracture of the stern-post occurred must be looked at. Her bottom was then so foul that she must have gone into dry dock for cleaning. That the true test of the underwriter's liability is the depreciation of the ship, and not the sum actually expended, is shewn by *Lidgett* v. *Secretan* (1); *Livie* v. *Janson* (2);

(1) Law Rep. 6 C. P. 616. (2) 12 East, 648.

Stewart v. *Steele* (1) and *Pitman* v. *Universal Marine Insurance Company* (2). It is true that the underwriters get a benefit from the fact of the ship being docked for scraping and painting, but that was owing to things which happened before the underwriters' liability attached and for which they are in not in any way responsible. If the respondents' contention is right they will be better off than if the stern-post had not been fractured. There is no authority for any such rule of apportionment as has been applied by the Court of Appeal.

Cohen Q.C. and *J. Shiress Will*, Q.C., for the respondents:—

The questions, what is the amount of the average loss, and what is the underwriter's liability, are not always to be answered in the same way. Suppose a collision, and the owner of an insured ship recovers from the owners of the other ship not the whole of the damage (because they cannot pay the whole) but so much that the residue is less than 3 per cent. The underwriter is not absolved. The warranty clause only frees the underwriters from liability where the damage (not the ultimate liability) is less than 3 per cent. The question whether any case of particular average loss comes within the warranty depends upon the original amount of the damage, before credit is given to the underwriters for relief of any character to which, in settling the claim, they may be entitled. Therefore, whether or not they are to get credit in the end for any apportionment of the dock dues in consequence of the cleaning, scraping and painting done while the stern post was being repaired, they are not entitled to take the same into account in estimating whether the damage done is within the warranty or not: Arnould, Marine Insurance, 5th ed. p. 802; 2 Phillips on Insurance, s. 1791. The damage done is to be measured by what it would cost to repair it, and in considering whether or not the warranty was satisfied it would be immaterial whether or not the assured were entitled to recover from other persons compensation for part of the same damage—a circumstance which would not reduce the damage below 3 per cent., but would give the underwriters a title to partial relief by subro-

(1) 5 Scott, N. R. 927, 949. (2) 9 Q. B. D. 192.

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gation, on the principle of *Darrell* v. *Tibbits* (1). See also *Castellain* v. *Preston* (2). Though the ship required cleaning, scraping and painting, the owners were not bound to have these things done, and the underwriters were not entitled to require that they should be done. If the fracture had been discovered before going into dry dock the owners would have been entitled to do the cleaning &c. and to charge the whole of the dock dues to the underwriters. To find out an average loss you must estimate what it will cost to repair the loss, and you must look to the termination of the risk, as pointed out by Maule J. in *Stewart* v. *Steele* (3).

Assuming there is to be an apportionment the question what is a reasonable amount is a question of fact and has been determined by the arbitrator.

J. Gorell Barnes in reply:—

The fallacy of the respondents' argument is in leaving out of sight the particular circumstances of this case, and the fact that the expenses of docking must have been incurred apart from the fracture of the stern-post.

The only cases in which the average loss is not identical with the underwriter's liability is where the assured is indemnified aliunde, where the principle of subrogation comes in. The respondents' argument assumes that the loss was once over 3 per cent. and is reduced by something that happens; but the true view is that by the position of things the loss never reached 3 per cent. If there had been no policy the shipowner would have done exactly as he did in docking the ship. The expense of ascertaining an average loss cannot be added to the loss to make up the 3 per cent.: Arnould, Marine Insurance, 5th ed. p. 802. It may be worth while to refer to the rule adopted in America when new materials are supplied: a certain proportion of new for old is allowed; and "where the insurers are not to be liable for a partial loss under a certain per cent., it has been held that one third is to be deducted in making up this percentage": 2 Parsons' Marine Insurance, ed. 1868 p. 130 citing *Wallace* v. *Ohio*

(1) 5 Q. B. D. 560. (2) 11 Q. B. D. 380.
(3) 5 Scott, N. R. 927, 949.

Insurance Company (1) and *Perry* v. *Ohio Insurance Company* (2). The authorities shew that the test is what is the true loss to the assured: and that in the case of a time policy (as in the present case) the loss at the termination of the risk must not be looked at: *Stewart* v. *Merchants Marine Insurance Company* (3).

The House took time for consideration.

July 30. LORD HERSCHELL L.C.:—

My Lords, the sole question arising for decision in this case is, whether a particular average loss sustained by the respondents exceeded 3 per cent. within the meaning of the warranty contained in a policy of insurance underwritten by the appellants.

The *Vancouver*, the vessel insured, whilst on a journey from Hong Kong to San Francisco, encountered very heavy weather, which resulted in a fracture of her stern-post. At the time when the damage was incurred the vessel had a very foul bottom, which so much affected her speed that no prudent owner would have sent her to sea again without having been first scraped and cleaned. She lay for some time in San Francisco bay, and was on the 4th of January 1876 put into the graving dock for the purpose of being cleaned, scraped, and painted. She was put into dock for this purpose only, the injury to the stern-post being then unknown, and only discovered by a survey made in the dry dock. The vessel lay in dock until the 11th of January, the work necessary for repairing the stern-post occupying all that time. The cleaning, scraping, and painting proceeded concurrently with the necessary repairs to the stern-post. If the former alone had been requisite the vessel might have left the dock on the evening of the 6th of January. The cost of repairing the stern-post, irrespective of dock dues, was less than 3 per cent. under the policy. The question then arose what portion of the dock dues ought to be added for the purpose of ascertaining the average loss. The appellants contended that only the dues for the days subsequent to the 6th of January ought to be so added, and this would still leave the loss under 3 per cent. The respondents contended that

(1) 4 Ohio, 234. (2) 5 Ohio, 305.
(3) 16 Q. B. D. 619.

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either the whole or a portion of the dues for the earlier days must be taken into account as part of the average loss. If half of these dues are to be attributed to the repair of the stern-post then the average loss exceeded 3 per cent. It was found by the arbitrator, who stated a special case between the parties, that if there was to be an apportionment of the dues, then, so far as the apportionment was a question of fact, it was to be taken that one half of the sum should be attributed to the repairs and one half to the cleaning and scraping.

The Court of Appeal, reversing the judgment of a Divisional Court, held that one half of the dues incurred whilst both operations were being carried on ought to be attributed to each of them, and that the average loss therefore exceeded 3 per cent. From this judgment the present appeal is brought.

I have entertained considerable doubt whether the appellants' contention ought not to prevail, but I have after consideration come to the conclusion, which, I believe, is shared by your Lordships, that the judgment of the Court below must be affirmed.

It is truly said for the appellants that a contract of insurance is a contract of indemnity only, and they urge that, if the judgment stands, the respondents will obtain something more than an indemnity for the injury to the stern-post, that they will obtain an actual advantage from its having been fractured. If, they say, no such disaster had occurred, the shipowners must, before using the vessel again, have had her cleaned and scraped, and for this purpose have paid for three days' docking. As it is, besides getting the stern-post repaired without cost to themselves, they are relieved of one half of the dock dues that they must otherwise necessarily have paid for the purpose of getting their vessel cleaned and scraped. I think it cannot be denied that they do obtain this advantage, but I do not think this conclusively establishes that the Court below have proceeded on an erroneous principle. It may, as it seems to me, sometimes unavoidably happen that the assured gain an incidental advantage from the fact that a damage arising from a risk within the policy has necessitated repairs at the expense of the underwriter. For instance a vessel requires scraping and painting at certain intervals, say of five years. Suppose that, a year before the time

has arrived for this being done in ordinary course, the vessel meets with a disaster for which the underwriters are responsible, and is docked for repairs. The shipowner takes advantage of the opportunity to scrape and paint his ship, in no way delaying the work of repair. It could not be contended that the entire dock dues for the time occupied in scraping and painting were to be borne by the shipowner, if they were to be borne by him at all, and yet, even if they were apportioned, the shipowner would obtain some advantage. Again, suppose that a vessel needs repairs on account of two different injuries, for only one of which the underwriter is liable, but certain materials required for repairing both injuries were obtained more cheaply than they would have been if purchased in the quantities required for one alone. It could surely never be contended that the underwriter was to pay less than the cost of repairing the sea damage for which he was liable, diminished as that cost would be by the cheaper acquisition of the material, and that part of the cost of it was to be thrown on the shipowner; and yet, if not, the shipowner would obtain some advantage by the circumstance that his vessel had sustained a disaster covered by a policy of insurance, and that the repairs thereby rendered necessary and other repairs which the shipowner had to undertake were executed together.

It was contended by the Attorney-General and Mr. Barnes, for the appellants, that the loss sustained by the shipowner by the disaster insured against was to be measured by the depreciation of the value of his vessel thereby occasioned. And they ingeniously argued that in the present case, inasmuch as the vessel whose stern-post was injured had already so foul a bottom as to necessitate docking before another voyage was prosecuted, she was only depreciated to an extent that would be covered by the cost of the necessary repairs, plus the cost of the extra docking for that purpose beyond what was requisite for cleaning her.

It is on this point that I have entertained doubts whether the view presented on behalf of the appellants was not the sound one. But I have come to the conclusion that a particular average loss is not as an ordinary rule to be measured in the manner contended for.

Although there was considerable difference of opinion expressed

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by the judges in the Court of Appeal in the case of *Pitman* v. *Universal Marine Insurance Company* (1), as to the mode in which the amount of the particular average loss in that case was to be arrived at, all the judges were, I think, agreed that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled as a general rule to recover the sum properly expended in executing the necessary repairs less the usual allowances.

This is, I think, the correct view. It has not been usual in cases of partial loss to apply the test suggested by the appellants, and it would often launch the parties upon an inquiry embarrassing and difficult of determination.

I have not lost sight of the fact that the vessel was put into dock only for the purpose of being scraped and painted. But I cannot think that this is material. The injury to the stern-post was immediately discovered, and she remained and was kept there, and the dock was employed for both purposes.

Once this conclusion is arrived at, and also that the cost of repairing the damage caused by the perils insured against is the true test, all the rest, I think, follows. And I concur in and have nothing to add to the reasoning by which the Master of the Rolls reached the conclusion that one-half of the dock dues for the first three days should be considered part of the cost of the repairs for which the appellants were responsible.

I, therefore, move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

LORD BLACKBURN:—

My Lords, this is an appeal against an order of the Court of Appeal of the 8th of July 1885, on appeal from an order made by the Queen's Bench Division, by which it was ordered that judgment on the special case herein be entered for the defendants. The order appealed against then proceeds: "This Court doth declare in respect of paragraph 10 of the special case stated herein that the warranty contained in the said policy has been satisfied by reason of there having been a particular average loss of £3 per cent."

(1) 9 Q. B. D. 192.

I think that the only question before this House is whether, on the statements in the special case, this declaration is right. I have come to the conclusion that it is right. But before stating my reasons for so thinking, I wish to say a word as to an argument urged by the Attorney-General, which I think does not apply to this case.

The *Vancouver* steamship was at the time when the stern-post was broken on a voyage to San Francisco with cargo. I agree with the Attorney-General that the primary duty of the ship-owners was, if practicable, to carry that cargo to San Francisco, and there deliver it. And, though I think it not necessary to decide it, I am not prepared to say that, if in order to fulfil that primary duty it had been necessary to bring the ship into dock and pay dock and harbour dues, there would have been ground for charging any portion of those to underwriters on the ship, even though in consequence she was brought into a place where the repairs for which they were liable would be more cheaply and conveniently done than if the vessel had not been brought in. But that primary duty was in this case completely fulfilled on the 18th of February 1875. And then the owners were under no obligation to any one to proceed at once to put the ship in order for a fresh voyage, or to go into dock till it suited them. It suited their convenience to allow her to lie in the bay of San Francisco till January 1876, a space of nearly eleven months, during which the policy for twelve months from the 1st of March 1874 ran out by efflux of time. Then they proceeded to put the ship in order.

I agree with the Master of the Rolls that the first question is, what would be the measure of the average on the hull which the underwriters would have had to pay if there had been no warranty free of average on the policy, and that we are then to see whether that amounts to 3 per cent. Some cases were referred to by Mr. Barnes on the argument which shew that there sometimes is difficulty as to what averages could be joined to make up 3 per cent., but no such question is raised on the statements in the special case, and I think it unnecessary to pursue this subject.

Now I think that, if by delaying as they did for nearly a year the owners had increased the cost of the repairs, it would be

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unfair to charge more against the underwriters on that account; but, except in that respect, I agree with the Master of the Rolls that the shipowners might take their own time, and then, when they do the whole repairs, as well those which they have to bear themselves as those which concern underwriters or others, that, if fairly and reasonably done, fixes the amount, and it is a question how much of that expense is to be attributed to the repairs the cost of which the owners themselves had to bear, and how much to the repairs of that damage for which they had to be indemnified by the underwriters. All depends on the statements in the special case. The first paragraph of the special case sufficiently states the effect of the policy. I think it indisputable that the fracture of the stern-post described in the second paragraph of the special case was a damage to the hull of the *Vancouver* during the time she was covered by the policy. It was occasioned by one of the perils against which the appellants were to indemnify the respondents. And I think it also indisputable that the foulness of the bottom of the ship was a damage to the hull of the vessel occasioned by wear and tear, against which the underwriters were not bound to indemnify the respondents. It is said in the third paragraph that "at the time when the damage" occasioned by the underwriter's perils was incurred, the bottom of the vessel was already very foul, and that "it may be taken as a fact in the case that she would not have put to sea again after the 18th of February without being first put into dry dock for the purpose of having her scraped and cleaned." I do not think it important when the foulness which rendered it reasonable and proper for the owners for their own sakes to have their vessel put in the dry dock arose. The foulness would, I presume, go on increasing from day to day till the day when the *Vancouver* was put into the dry dock, and indeed that may be inferred from the statement in the fourth paragraph, but no part of it was chargeable to the underwriters, whether it was incurred earlier or later. And the shipowners, acting as reasonable men, would have sooner or later to put her in the dry dock in order to scrape, clean, and paint her.

They were under no obligation to any one to have her put in a state for proceeding to sea till it suited them to do so. That was

not till January 1876, about eleven months, during which time the appellants' policy expired by efflux of time. But the appellants were liable to indemnify against the expense of the repairs due to the underwriters' perils accruing whilst that policy was unexpired, unless the warranty is satisfied. That expense was not in any way increased by this delay. The owners acting with a view to their own benefit caused the *Vancouver* to be placed in the dry dock.

It is said in paragraph 4 of the special case that the owners "determined to put her in dry dock for the purpose of having her cleaned, scraped, and painted, and *for that purpose only*." I do not understand this as meaning more than that they determined to do this on that account, whether there were other reasons for putting and keeping her in the dry dock or not. The first step which was taken as soon as the ship was dry was, what I think is usual and was evidently reasonable, to hold a survey, and *then* the surveyors discovered that the stern-post was broken about thirty inches above the keel, and recommended its repair. This was proper advice, whether the cause of that breakage was one for which the owners were entitled to come upon underwriters, or one on which they stood their own insurers.

The case then proceeds: "It was accordingly repaired in dry dock with all reasonable speed and economy, and the vessel was discharged from dry dock on the 11th of January repaired, cleaned, scraped, and painted." Then follow the 6th and 7th paragraphs, which I need not read and which I cannot abridge. The 8th and 9th paragraphs only state the contentions of the parties. [His Lordship read part of the 8th and 9th, and also the 10th.]

The Court of Appeal all agreed that the $3292·37 should be attributed partly to repairs and partly to cleaning, scraping, and painting. I do not think it can properly be said to be a question of pure fact, or a question of pure law, in what proportions the sum should be divided. I think when once it is established that part of the expense is to be attributed to one cause and part to another, it is a mixed question of law and fact under the circumstances how much to each. And I agree with the majority that in this case it ought to be in equal proportions.

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I have now to dispose of one further argument made at the bar which seems to have been what mainly influenced Manisty, J.

There is no doubt that a contract of insurance is a contract of indemnity. And it was argued that if the owners who, had there been no damage to the stern-post, would in order to clean and scrape the ship have had to pay the whole $3292·37 of dock dues, now get that done for one-half of the sum, the other half being paid by the underwriters, they get more than an indemnity. They make, it is said, a profit. I think this is a fallacy—ingenious, but not sound.

The whole, both what concerns the shipowners and what concerns the underwriters, has to be repaired. It is best and most cheaply done by doing them both together, for whom it may concern, in the dry dock at the same time; and that being so, each of the parties concerned gets his work done more cheaply because it is done wholesale. Neither is entitled to take the whole benefit of the reduction of cost and apply it to his own work exclusively. The facts in the case of *Kemp* v. *Halliday* (1) were very complicated. But I think it will be found on examination that the judgment of the Exchequer Chamber, reported in 6 Best & Smith, 763, recognises the principle that in calculating whether the repairs necessary to save the insured subject bore such a relation to its value when saved as to justify the assured in refusing to do them, the fact, if it be one, that the best way of doing them was in such a manner as to benefit others, who would then have to pay part of the joint expense, is not to be ignored.

I think that the appeal should be dismissed with costs, and I agree in the judgment proposed by the Lord Chancellor.

LORD FITZGERALD:—

My Lords, I entirely concur in the judgments which have been delivered, and I can add nothing with any advantage. From an early stage in the argument I thought that the reasoning of the Master of the Rolls in the Court of Appeal ought to be adopted, together with his very simple and sensible mode of adjusting the expenses which have been incurred in San Francisco in the

(1) 6 B. & S. 723.

joint operation of cleaning and repainting the vessel and repairing her sternpost.

LORD ASHBOURNE:—

My Lords, I also think that the judgment appealed from ought to be affirmed. In my opinion the judgment of the Master of the Rolls in the Court of Appeal proceeded on entirely sound grounds, and I think that the decision which he pronounced quite met all the justice of the case.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals 30th July 1886.

Solicitors for appellants: *Waltons, Bubb, & Johnson.*
Solicitor for respondents: *Clements.*

[PRIVY COUNCIL.]

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GEORGE HENRY TAYLOR AND ANOTHER . PLAINTIFFS;

AND

BANK OF NEW SOUTH WALES . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Principal and Surety—Liability of Surety.

The appellants having become sureties on the faith of a mortgage granted by the principal debtor to his creditor, claimed to be released wholly or pro tanto from liability, on the ground that the creditor had without notice to them sold parts of the mortgaged property in a manner unwarranted by the terms of the mortgage deed, and that inasmuch as the purchaser had failed to pay the price, they had been deprived of the benefit of a security upon which they were entitled to rely for protection:—

Held, that on the evidence the sale was effected by the mortgagor, although with the previous consent of the mortgagee, in the due course of his management and in a manner contemplated by the mortgage deed, and that the liability of the sureties was not affected thereby.

APPEAL from a decree of the Supreme Court (May 23, 1884) reversing a decree of the Primary Judge in Equity (Nov. 13, 1882), whereby the appellants had been discharged from all liability to the respondents under a cash credit bond dated the 5th of September, 1878, executed by the appellants as sureties for one Alfred Nugent Taylor.

By the bond the appellants, who are the father and brother of the debtor, were jointly and severally bound to the respondents in the penal sum of £3500, to reimburse and pay to the respondents all moneys whatsoever which Alfred Nugent Taylor should from time to time borrow from the respondents or which the respondents should from time to time lend, pay or advance to or for the said Alfred Nugent Taylor in respect of the matters in the said bond mentioned, or which the respondents should become liable to advance for the said Alfred Nugent Taylor, or in which the said Alfred Nugent Taylor should in any way

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become indebted to the respondents: Provided, nevertheless, that the appellants or either of them should not be liable by reason of the said bond to pay more than £2500 of lawful British money, and a sum equal to one year's interest thereon, and the costs and expenses incurred in obtaining payment of the said sums respectively, but the said bond should be a continuing security to the respondents to the amount of the said sums respectively, exclusive of costs, notwithstanding any settlement of account or any other matter or thing whatsoever.

The facts are stated in the judgment of their Lordships.

On the 27th of July, 1881, the appellants filed their statement of claim in this action, in which they alleged that they executed the cash credit bond of the 5th of September, 1878, in the faith and credit of the mortgage deed and wool lien, and claimed that they were discharged from any liability under the bond by reason of the sale of the 2500 sheep in the mortgage mentioned, or that they were discharged from such liability to the extent of £810, or that an account might be taken of the amounts realised by the sales of the mortgaged sheep and wool, and that they might be discharged on payment of the sum (if any) by which the amount of the appellants' liability under the said bond exceeded the sum so received.

On the 24th of November, 1881, the respondents filed their defence and counter-claim. They therein alleged that the sale of the sheep was within the powers of the mortgage deed, and carried out prudently and in accordance with the usual practice in those cases, and that the proceeds of the sale of the wool were properly applied in reduction of the general indebtedness of Alfred Nugent Taylor, in respect of advances made to him; that if the appellants were credited with the full amount for which the sheep mortgaged were sold and not charged with the dishonoured promissory note which had been given therefor, the appellants would still be indebted to the respondents to the amount of £1250; that the appellants had been guilty of laches, and that the appellants, any how, should pay the costs of the lawsuit; and in their counter-claim they claimed that an account should be taken of what was due from the appellants to the respondents on the bond.

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Cozens-Hardy, Q.C., *Nugent*, and *Arkcoll*, for the appellants:—

It was contended that the bank, by selling and removing 2500 of the mortgaged sheep without the consent of the appellants, had deprived the sureties of the security on which they were entitled to rely. The appellants were consequently released from all liability under their bond. If not from all liability, at least to the extent of £810, the value of the sheep so removed and sold. The bank was not entitled to sell under the mortgage deed, for the conditions precedent to their right to do so had not been fulfilled. [SIR BARNES PEACOCK:—Was not this a sale by the mortgagor in possession, and in the due course of his management? LORD WATSON:—Was it not within the contract contained in the mortgage and contemplated by the sureties?] The bank consented to the sale and authorized it, thereby rendering it their act. Even if it had complied with the terms of the mortgage deed, and fulfilled the conditions there stipulated for, there was negligence in not satisfying itself of the solvency of the purchaser, and it cannot charge the loss resulting from its own negligence against the sureties. Reference was made to *Polak* v. *Everett* (1); *Holme* v. *Brunskill* (2). In this case such a variation of the rights of the parties had been effected by the acts of the bank that the sureties had been discharged.

Their Lordships intimated that they would hear the respondents' counsel upon the question whether the sale was made under such circumstances as to be justified.

Lumley Smith, Q.C. (Sir *Horace Davey*, S.G., with him), for the respondents, contended that the evidence shewed that the sale took place under such circumstances as were contemplated by the deed and the contract of suretyship. Nothing had been done by the creditor which was contrary to the faith of his contract: see *Petty* v. *Cooke* (3). Further than that, the sale was not the act of the respondents at all, nor was there any negligence or breach of duty by them. The mortgagor was in possession, and he sold the sheep in the due course of his management, with the approval of the bank. That approval and consent did not

(1) 1 Q. B. D. 669. (2) 3 Q. B. D. 495.
(3) Law Rep. 6 Q. B. 790.

render the sale their act so as to render compliance with the terms of the proviso in the mortgage deed necessary to its validity as between them and the sureties.

Cozens-Hardy, Q.C., replied.

June 25. The judgment of their Lordships was delivered by

LORD WATSON:—

The appellants are sureties, under a cash credit bond, dated the 5th of September, 1878, for advances to be made by the respondent bank in account current with Alfred Nugent Taylor, the principal debtor in the bond. The liability of the sureties is limited to £2500 sterling, with a sum equal to one year's interest thereon, and the cost of recovering payment.

Of the same date with the bond, the principal debtor mortgaged to the bank, as a collateral security for such advances, the stock of sheep, then amounting to about 6500, upon a run of 4000 acres, at Frampton, in the parish of Cootamundra and colony of New South Wales, and all the increase, progeny, wool, skins, and tallow, and other produce of the same. The deed of mortgage provides that it shall be lawful for the mortgagor peaceably to retain and have the possession and management of the mortgaged property until default is made in payment of the moneys thereby secured. It also provides that the bank shall have power to enter into possession, and to sell the mortgaged property, by public auction or private contract, for such prices and with such credit to the purchasers as they may think fit, "if default shall be made by the said mortgagor, his executors, administrators, or assigns, in payment on demand, as provided by said bond, of any sum or sums of money secured by the said bond, and collaterally by these presents, contrary to the tenor and effect, true intent, and meaning of the said bond; or in case of the breach of any of the covenants on the part of the said mortgagor herein contained; or in case any circumstances whatsoever shall arise which, in the opinion of the board of directors of said bank, shall render it necessary for the safety or security of the said bank so to do, although no such default shall have been made."

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In December, 1878, at a time when no default had been made, and the mortgagor was still in possession, he thought it expedient to sell 2500 of the mortgaged sheep; and he accordingly, with the assent of the local manager of the bank at Cootamundra, sent them to a station called Forbes for sale. On the 19th of January, 1879, the mortgagor, with the assent of the respondents' manager at Forbes, sold the sheep at 6*s.* 3*d.* per head, on six months' credit, to Wilton R. Suttor, who gave his promissory note for £810, payable six months after date. The note was indorsed to the bank by the mortgagor, and credited to him in account; and the amount was shortly after drawn out by his cheques. At maturity the note was dishonoured, in consequence of the insolvency of Suttor, and no part of its contents has as yet been recovered. No notice of the sale of these 2500 sheep was given to either of the appellants.

In the year 1880, default having been made in payment of the sums due under the cash credit bond, the bank brought a common law action against the appellant, the Rev. Herbert Edward Taylor, for a balance of £947 13*s.* 3*d.*, alleged to be due by him as surety, according to an account stated in terms of the bond. In that account the said appellant was debited with the sum of £810 "to overdue bill, Suttor to A. N. Taylor, discounted 25th January, 1879, dishonoured 20th July, 1879," and but for that item of charge, and interest thereon, the balance would have been in favour of the said appellant. At the trial of the cause, the jury found a verdict for the bank, and the Court, upon the 16th of June, 1881, discharged a rule for a new trial, and entered judgment against the said appellant for the sum of £947 13*s.* 3*d.*, with costs.

The appellants, on the 27th of July, 1881, brought a suit in equity, in which the present appeal is taken, for the purpose of obtaining a declaration that they are released from all liability to the bank as sureties under the cash credit bond, or otherwise of having an account taken of the true balance due by them under the bond, and for an injunction to restrain the bank from proceeding with their action at law against the appellant, the Rev. Herbert Edward Taylor. The bank lodged a defence, and also a counter-claim, in which, upon a restatement of the items

in account between themselves and the sureties, they brought out a balance of £1250 as due by the appellants, after crediting them with the sum of £810, on the footing that it had been actually paid to the bank by Suttor when his acceptance became due. The Primary Judge (Sir W. M. Manning), after evidence was adduced by both parties, gave judgment on the 13th of November 1882, declaring that the respondents were released from all liability to the bank as sureties under the cash credit bond, granting an injunction as craved, and dismissing the bank's counter-claim. On appeal by the bank to the Supreme Court of New South Wales, the Court, consisting of Chief Justice Sir James Martin and Mr. Justice Windeyer (Faucett, J., dissenting), reversed the order of the Primary Judge, except in regard to the counter-claim, and condemned the appellants in costs.

The appellants maintain that the conduct of the bank in selling or permitting these 2500 sheep to be sold, in January, 1879, was unwarranted by the terms of the deed of mortgage, and deprived them of the benefit of a security upon which they were entitled to rely for their protection; and, consequently, that they are discharged from all liability, or at least that they are released from liability to the extent of £810.

It is not disputed that the appellants became parties to the cash credit bond, on the faith of the mortgage; and that the bank, in realizing the mortgaged property, was bound, as in a question with them, to strict compliance with the provisions of the mortgage. The transaction with Suttor was not, in the opinion of their Lordships, a sale by the bank in terms of the proviso in that deed. There had been no default, no breach of the covenants of the mortgage, and it is obvious that the sheep were not sold because, in the opinion of the directors, a sale was necessary for the safety or security of the bank. It is therefore unnecessary to express any opinion upon the question, which was very fully discussed at the bar, whether the third alternative of the proviso requires that the opinion of the directors shall be deliberately formed at a meeting of the board, and entered in their minutes, or whether it is sufficient that the manager of the bank shall act upon his own opinions, subsequently approved by the directors.

It appears to their Lordships that the parties to the mortgage,

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and all persons who relied upon its provisions, must be held to have contemplated that, so long as the mortgagor remained in possession, there would be sales from time to time, in the course of due administration, of portions of the mortgaged property; and there is no provision that notice of such sales shall be given to the appellants. The bank was entitled to receive the proceeds of these sales, but the management of the sheep stock was still with the mortgagor, and, until the bank put an end to his management, he was entitled to deal with the stock in the ordinary course of his business as a sheep farmer. Accordingly the sale to Suttor was in point of fact made by him, as appears from the pleadings of the parties, as well as from the evidence led before the Primary Judge. The mortgagor, who was a witness for the appellants, explains that his reason for sending away the 2500 sheep was, that the Frampton run was to that extent overstocked, and prices were good at the time, To use his own language, he "thought it best in due management." It is nowhere suggested that it was out of the ordinary course of his business to give six months' credit, upon an approved bill, to the purchaser. It is no doubt true that the mortgagor did inform the local managers of the bank at Cootamundra and Forbes, of his intention to sell the sheep, and of the terms of sale, and that they gave their consent, after they had made inquiry into the circumstances of Suttor and found that he was a person in good credit. It was right and proper that the mortgagor should communicate with these gentlemen, because the bank had an interest in the stock, and had power, at his expense, to send persons to examine and report upon his management. The fact that he acted prudently in consulting the local managers of the mortgagees, cannot alter the real character of the transaction, as a sale within his powers of management, carried out in good faith, and in the ordinary course of business.

The views already expressed are sufficient for the disposal of this appeal; but their Lordships desire to add that, even if it had been shewn that the benefit of the price of these 2500 sheep was lost to the sureties through the act of the bank, the appellants would not have been thereby discharged from all liability. In that event, the present case would not have been within the

principle of *Polak* v. *Everett* (1) and *Holme* v. *Brunskill* (2), which were relied on in the argument for the appellants. In both these cases there had been an alteration of the original contract between the creditor and the principal debtor, without the consent of the surety, who was held to be wholly discharged, on the plain ground that he could not be made liable for default in the performance of a contract which he had not guaranteed. The present case would, in such event, have been within the rule of *Pearl* v. *Deacon* (3), where the creditor had, by his own act, rendered unavailable part of the security, to the benefit of which the surety was entitled, and the latter was held to be discharged, not absolutely, but only *pro tanto*. Moreover, had their Lordships held that the sureties were entitled to relief to the extent of £810, the price of the sheep in question, the only result would have been to enable the appellants to have that sum stated as an item of credit in the account sued on in the action at law, because the £810 with which they are debited in that account represents actual advances made by the bank in terms of the cash credit bond, upon cheques drawn by the principal debtor. Their Lordships could not have introduced that sum of £810 as an item of credit, without giving the bank an opportunity of restating the account; and that is a result which was not desired by the appellants.

Their Lordships will accordingly humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellants must pay to the respondent the costs of this appeal.

Solicitor for appellants: *J. P. Tomes.*

Solicitors for respondents: *Waltons, Bubb, & Johnson.*

(1) 1 Q. B. D. 669. (2) 3 Q. B. D. 495.
(3) 24 Beav. 186; 1 De G. & J. 461.

[PRIVY COUNCIL.]

J. C.* 1886 July 16.

DAGNINO . . . . . DEFENDANT;

AND

BELLOTTI . . . . . PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF GIBRALTAR.

Right to appeal—Appellant's Remedy in the Court below.

Where a defendant objected to a verdict on the ground that it was not warranted by the evidence, but neglected to move the Court for a new trial in the manner directed by the rules and practice of the Court:—

Held, that Her Majesty in Council could not alter the verdict, or set it aside, and could not be advised to direct a new trial, the appellant not having applied in that behalf to the Court in the regular course.

APPEAL from a decree of the Supreme Court (June 2, 1885), whereby judgment was entered for the respondent for 20,842 pesetas, with costs, in an action for goods sold and delivered, money paid, and work and labour done.

The trial took place before the Chief Justice and three sworn assessors. No application for a new trial was made, but on the 6th of June the defendant petitioned for leave to appeal to Her Majesty in Council, and the petition was registered. On the 9th of June he moved for leave to appeal, which was opposed by the plaintiff on the ground that there should have been a motion for a new trial within four days, but granted by the Court, the Chief Justice ruling, that under the charter he had no option to refuse leave, "though the authorities cited might prove fatal in the Privy Council."

Arbuthnot, and *J. Frobisher Mills* (*Matthews*, Q.C., with them), for the appellant, contended that he should be allowed to shew that the verdict could not be justified by the evidence, and that no reason was given, or could be suggested, for arriving at its amount. The respondent's case was that the appeal was excluded by reason of the omission to apply to the Supreme Court for a new trial within four days from the verdict, as directed by the rules. But that rule only applies where one judge alone had found the facts

* *Present*:—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

—here the verdict was of a judge and three assessors. Clark's Colonial Law, p. 684; *Santa Cana* v. *Ardevol* (1), *Canepa* v. *Larios* (2); *Musadee Mahomed Cazum Sherazee* v. *Meerza Ally Mahomed Khan* (3); *Tronson* v. *Dent* (4).

Greene, Q C., and *W. English Harrison*, for the respondent, were not called upon.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

Their Lordships do not think it necessary to call upon the counsel for the respondent.

This is an appeal against a judgment and decree of Her Majesty's Supreme Court of Gibraltar, dated the 2nd of June, 1885, in which, in an action for goods sold and delivered, judgment was entered for the respondent, the plaintiff, for the sum of 20,842 pesetas, together with the costs of suit. By the Charter of Justice of the Court of Gibraltar, that Court consists of a single judge, and it is provided that "all issues of fact arising in civil suits, or actions depending in the said Court, shall be tried and decided by the said judge and three assessors to be appointed as hereinafter mentioned, until otherwise provided for by law; and that the verdict of the said judge and assessors, on the trial of any such issue, shall be according to the majority of votes, but if such votes shall be equally divided, then according to the opinion of the said judge; and every such verdict shall be delivered in open Court by the mouth of the said judge." By the same charter a provision is made for an appeal to Her Majesty in Council in certain cases, and it is also provided that on trials before the judge and assessors in appealable cases the evidence given in the case shall be recorded. By another portion of the charter a power is given to make Rules of Court, and by one of those rules it is provided: "That all judgments shall be promulgated at the expiration of eight days from the time of their being pronounced, and in case of a trial by the judge and assessors, or by a jury, each party shall be allowed four clear days after judgment pronounced in which to move the Court, if in term, or take out a

(1) 1 Knapp, 269.
(2) 2 Knapp, 283.
(3) 8 Moo. P. C. 112.
(4) 8 Moo. P. C. 441.

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summons before the judge if in vacation, for a new trial, upon such grounds alone as new trials are granted upon by the Courts at Westminster, giving two clear days' notice of the motion or the summons."

In the present case it is contended that the judgment was wrong, because it gave effect to a verdict which was not warranted by the evidence. If the verdict was not warranted by the evidence, the case fell within the rule which has just been read, which states that the party may move for a new trial. The proper course for the appellant to have adopted was, if he considered that the verdict was not warranted by the evidence, to move the Court for a new trial. He has not exhausted the remedies which the rules and practice of the Court directed should be observed in cases where a verdict of the judge and assessors is objected to upon the ground that it is not warranted by the evidence. It would be very inconvenient if parties, without moving the Court for a new trial, could be at liberty to ask Her Majesty in Council to set aside the judgment upon the ground that the verdict was wrong, without having taken that course which is pointed out by the rules made in pursuance of the charter to be adopted in the case of an objection to a verdict. The parties may be put to very great expense by an appeal to Her Majesty in Council in a case in which that expense might be avoided by adopting the course of applying to the Court below; and it would be very inconvenient if the parties could come here and ask Her Majesty in Council to reverse that judgment without going in the first instance to the judge who had seen the witnesses and knew the whole of the circumstances of the case, and applying to him to have that verdict reviewed.

Her Majesty cannot alter the verdict or set it aside, and their Lordships are of opinion that they cannot advise Her Majesty to direct a new trial, the parties not having applied to the Court in the regular course instead of coming here.

Their Lordships will therefore humbly recommend Her Majesty to affirm the judgment of the Court below. The appellant must pay the costs of this appeal.

Solicitors for the appellant: *Freshfield & Williams.*
Solicitors for respondent: *Clarkson, Greenwell & Wyle.*

[PRIVY COUNCIL.]

THE WINDSOR AND ANNAPOLIS RAILWAY COMPANY . . . . . } PLAINTIFFS;

AND

THE QUEEN AND THE WESTERN COUNTIES RAILWAY COMPANY . } DEFENDANTS.

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June 2, 3, 25.

AND CROSS APPEAL BY THE QUEEN.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Petition of Right—Damages for Breach of Contract by the Crown.

It is settled law that a petition of right will lie for damages resulting from a breach of contract by the Crown.

Thomas v. *The Queen* (Law Rep. 10 Q. B. 31) and *Feather* v. *The Queen* (6 B. & S. 293) approved.

It is immaterial whether the breach is occasioned by the acts or by the omissions of the Crown officials.

APPEAL and cross appeal from a decree of the Supreme Court of Canada (Feb. 16, 1885) reversing a decree of the Exchequer Court (May 18, 1883).

The facts are stated in the judgment of their Lordships.

The proceedings were commenced by a petition of right, which, under sect. 6 of the Petition of Right Act, 1876 (39 Vict. c. 27, Canada), was served on the respondents, the Western Counties Railway Company, who were thus made parties in the case. The question raised on the cross appeal was whether in the circumstances a claim for damages by the process of petition of right could be asserted against the Crown, and on the appeal as to the amount of the damages.

The former case referred to in the judgment was heard by the Judicial Committee and decided on the 22nd of February, 1882. It is reported in 7 App. Cas. 178.

The present case was decided by Gwynne, J., subsequently to that decision. The learned judge, after referring thereto, said

* *Present:*—LORD WATSON, LORD HALSBURY, LORD HOBHOUSE, SIR BARNES PEACOCK, SIR MONTAGUE SMITH, and SIR RICHARD COUCH.

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that the only point raised in this case was whether proceedings by petition of right can be taken against Her Majesty to obtain satisfaction in damages for the pecuniary losses alleged to have been sustained by the appellants by reason of the conduct which is the subject of the appellants' complaint, and if a petition of right does lie in such a case what is the proper and reasonable amount recoverable by them from Her Majesty under the circumstances. The learned judge held that a petition of right could not under the circumstances be maintained to recover damages from Her Majesty, and dismissed the petition with costs, leaving the appellants to pursue their remedy for compensation against the respondents, the Western Counties Railway Company, under the judgment recovered against that company in the suit above mentioned.

The case was heard on appeal before the Supreme Court of Canada, Ritchie, C.J., and Strong, Fournier, Henry, Taschereau and Gwynne, JJ.), and is reported in 10 Can. S. C. R. p. 335. Ritchie, C.J., and Taschereau, J., held that the petition of right lay under the circumstances for the recovery of damages against the Crown, but that the damages should be limited to the loss sustained during the time that the Crown was in possession of the branch line and before it was handed over by the Crown to the Western Counties Railway Company, that is to say, the period between the 1st of August, 1877, and the 24th of September, 1877. Fournier and Henry, JJ., held that the petition of right lay, and that damages were recoverable against the Crown for the whole period from the time of the Crown taking possession of the branch line to the filing of the petition of right, and Henry, J., assessed such damages at $56,500. Strong and Gwynne, JJ., held that the petition of right did not lie, and that the appeal should be dismissed. The damages for the period between the 1st of August, 1877, and the 24th of September, 1877, were subsequently assessed at $9,589·07, and judgment was entered for that sum, the appeal being allowed.

Sir *Horace Davey*, S.G., and *Bompas*, Q.C., for the appellant company, contended that the company was entitled to a petition of right. The acts of the Crown and the Government of Canada

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which were complained of, amounted to a breach of the agreements of the 22nd of September, 1871, and the 22nd of June, 1875, and of the contract for undisturbed possession of the Windsor Branch Railway contained therein. A further breach was the prevention of the appellants from working the trunk line in accordance with the agreements. There was also a wrongful possession by the Government of Canada of the Windsor Branch Railway before handing it over to the Western Counties Railway. Reference was made to Canada 37 Vict. c. 27; *Thomas* v. *The Queen* (1); *Tobin* v. *The Queen* (2); *Feather* v. *The Queen* (3); *The Queen* v. *McFarlane* (4); *The Bankers' Case* (5). The appellants were entitled to full compensation or damages for the loss sustained by them by reason of the breaches complained of. The profits of the Crown from the Windsor Branch had been assessed at the inadequate sum of $9589, being limited to the period from the 1st of August, 1877, to the 24th of September, 1877, whereas they ought to have been ascertained up to the 1st of December, 1879.

Rigby, Q.C., and *Jeune*, for the Crown, contended that the judgment of the Exchequer Court and of Strong and Gwynne, JJ., in the Supreme Court, were right. Under the circumstances of the case, a petition of right does not lie for recovery of damages against the Crown. 37 Vict. c. 27, does not give to a suppliant any remedy against the Crown other than such as existed in England prior to 23 & 24 Vict. c. 34. Such a petition does not lie for damages for a tort, and the exclusion of the appellant from using the branch line was a tort and not a breach of contract. It was a trespass unlawfully and forcibly committed by the servants of the Crown. All damages to which the appellant is entitled have been recovered or are recoverable by legal process against the Western Counties Railway. Reference was made to *Tobin* v. *The Queen* (6). The Governor-General in Council was not acting as the officer or agent of the Crown, but as the mandatory of the Canadian Parliament. Consequently there was no breach

(1) Law Rep. 10 Q. B. 31.
(2) 16 C. B. (N.S.) 310.
(3) 6 B. & S. 257.
(4) 7 Can. S. C. R. 216.
(5) 14 St. Trials, 39.
(6) 16 C. B. (N.S.) 310, 340.

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of contract by the Crown. The eviction was by a stranger, and the Crown was no party to it: *Cameron* v. *Kyte* (1); *Musgrave* v. *Pulido*. (2) It cannot be said that acquiescence by the Crown is equivalent to its express authority. With regard to the remedy in this case, the Crown can do no wrong. If it inadvertently enters on possession to which it has no right, a petition lies; if a tort is committed the subject is referred to his action against the person who did it. Where there is a remedy against a subject there is no room for a petition of right against the Crown. An entry without title by a subject gives an action against him, whether or not it is in breach of covenant for quiet enjoyment by a lessor or grantor: see Chitty's Prerogative, p. 373—petition of restitution; Staumford's Exposition of the King's Prerogative, fol. 740. The only remedy against the Crown would be in respect of profits received during a six weeks' possession. [LORD HALSBURY:—The King can do no wrong means that he cannot commit a tort—he can do wrong in other senses.] A subject, no doubt, can waive a tort and proceed for breach of contract, but this is a tortious breach, if any, which is complained of. If the Crown breaks a contract it does so by an agent: in order to impute liability to the Crown you must shew that there was no tortious act, for then the agent, and not the Crown, would be liable: *Thomas* v. *The Queen* (3), where the claim was under a contract and not for breach of it. The Crown is not liable for the positive acts of its officials, even when it has authorized them. It is liable only for their omissions. Upon the question of damages it was contended that the judgments of Ritchie, C.J., and Taschereau, J., were correct. [*Bompas* referred to *Child* v. *Stenning* (4).]

Bompas, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD WATSON:—

The Government of Canada, by an agreement dated the 22nd of September, 1871, undertook to give the appellant company

(1) 3 Knapp, 332.
(2) 5 App. Cas. 102.
(3) Law Rep. 10 Q. B. 31.
(4) 11 Ch. D. 85.

the exclusive use of the Windsor Branch Railway, and also running powers over the trunk line, from Windsor Junction to Halifax, for the term of twenty-one years, from the 1st of January, 1872. The appellant company, in pursuance of that agreement, entered upon and worked the Windsor Branch Railway until the 1st of August, 1877, when Mr. Brydges, the Government Superintendent of Railways, took possession of the line, and put an end to the occupation of the company. On the 24th of September, 1877, the same official gave possession of the line to the Western Counties Railway Company, under an arrangement, the terms of which are to be found in Schedules A and B of the Act of the Dominion Parliament, 37 Vict. c. 16.

The appellant company, on the 10th of October, 1877, filed a bill, on the Equity side of the Supreme Court of Nova Scotia, against the Western Counties Railway Company, in which they sought to obtain a declaration of their rights under the agreement of September, 1871, to recover possession of the Windsor Branch, and to have an account taken of the receipts of the defendant company, from freight and passenger traffic. On the 19th of September, 1878, the appellant company presented a petition of right to the Exchequer Court of Canada, under the provisions of the Dominion Act, 39 Vict. c. 27, in which they humbly prayed that the agreement of 1871 should be specifically performed, and also "that the sum of £150,000 sterling, or such sum as may be reasonable, may be paid to your suppliants in compensation and by way of damages for the injuries and losses which have been occasioned to them by the breach and failure of Her Majesty's Government of Canada to perform the said agreement of the 22nd of September, 1871."

In the Equity suit, Mr. Justice Ritchie, on the 1st of March, 1880, decided that the plaintiffs were "entitled to the judgment of the Court in their favour, with costs." That decision was affirmed by the Supreme Court of Nova Scotia, on the 6th of April, 1881; and on appeal to this Board, the judgments of both Courts below were affirmed, with costs, on the 22nd of February, 1882. Their Lordships held that the agreement of the 22nd of September, 1871, was valid and subsisting; and that the rights of the Windsor and Annapolis Railway Company under

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that agreement were not affected by the Canadian Act, 37 Vict., c. 16.

During the dependence of these proceedings the Government of Canada put an end to their arrangement with the Western Counties Railway Company, and, on the 1st of December, 1879, they allowed the appellant company to resume possession of the Windsor branch, and to exercise running powers over the trunk line, but that without prejudice to the rights or liabilities of Her Majesty, or the appellant company, except in so far as the question of damages might be thereby affected.

Her Majesty's Attorney-General for the Dominion of Canada appeared in the petition of right, and lodged a statement in defence on behalf of Her Majesty, on the 18th of October, 1880, but no further proceedings were taken in the cause until the judgment of this Board had been given in the Equity suit. On the 18th of May, 1883, Mr. Justice Gwynne decided that damages were not, in the circumstances of the case, recoverable from Her Majesty, and dismissed the petition with costs, "leaving the suppliants to pursue their remedy for such compensation against the Western Counties Railway Company, under their judgment already recovered against that company." A motion for a rule to shew cause why the judgment of Mr. Justice Gwynne should not be set aside was refused by the Court of Exchequer on the 26th of June, 1883. Upon an appeal against that decision to the Supreme Court of Canada, Sir W. J. Ritchie, C.J., and Taschereau, J., held that a petition of right lay against the Crown, but that the damages recoverable must be limited to the period of the Crown's possession of the Windsor branch from the 1st of August to the 24th of September, 1877. These learned judges were of opinion that the appellant company, by their proceedings in Equity against the Western Counties Railway Company, had elected to take that company as their debtors for all claims of damage arising after the 24th of September, 1877, and were consequently barred from preferring these claims against the Crown. Fournier and Henry, JJ., whilst agreeing that the petition of right lay, held that the Crown was liable for damages suffered by the appellant company after its possession had ceased. Gwynne, J., adhered to his former decision, and Strong, J., con-

curred with him. The Supreme Court, accordingly, on the 16th of February, 1885, reversed the judgment of the Court below, and ordered and adjudged that the suppliants are entitled to recover from Her Majesty the Queen the profits of the Crown from the Windsor Branch Railway from the 1st of August to the 24th of September, 1877, which they fixed at the sum of $9589·07.

The principal appeal from that judgment is taken by the appellants, the Windsor and Annapolis Railway Company, who object to it, in so far as it excludes their claim of damages after the 24th of September, 1877. The respondent, Her Majesty's Attorney-General for the Dominion of Canada, has brought a cross appeal, in which he seeks to have the judgment of the Supreme Court set aside, and to have the judgments of Mr. Justice Gwynne and of the Court of Exchequer restored.

The respondent has not, in the Courts below, or at their Lordships' bar, impugned the decision of this Board in the Equity suit between the appellant company and the Western Counties Railway Company. He has conceded that the appellant company have still the right to possess and use the Windsor branch line, under the agreement of 1871; and, seeing that the company was restored to possession in the year 1879, the Courts below have not thought it necessary to dispose of those parts of the prayer of the petition of right which relate to performance of the agreement of September, 1871.

Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown. Sect. 8 of the Canadian Petition of Right Act (39 Vict. c. 27, Dom. Parlt.) contemplates that damages may be recoverable from the Crown by means of such a petition; and the reasons assigned by Lord Blackburn for the decision of the Court of Queen's Bench in *Thomas* v. *The Queen* (1) appear to their Lordships necessarily to lead to the conclusion that damages arising from breach of contract are so recoverable. A suit for damages, in respect of the violation of contract, is as much an action upon the contract

(1) Law Rep. 10 Q. B. 31.

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as a suit for performance; it is the only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance has become impossible. In *Tobin* v. *The Queen* (1) Chief Justice Erle, whilst affirming the doctrine that the Sovereign cannot be sued in a petition of right, for a wrong done by the executive, took care to explain that "claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs."

It was argued for the respondent that in *Thomas* v. *The Queen* (2) the claim of the suppliant was not for damages, but for a pecuniary consideration alleged to have been due in terms of the contract; and consequently that it was unnecessary for the Court to decide anything as to the liability of the Crown for unliquidated damages resulting from breach of contract. But Lord Blackburn, in that case, deals with the suppliant's petition as alleging certain breaches of promises made to the suppliant on behalf of the Queen; and his reasoning appears to this Board to be quite as applicable to a claim of unliquidated damages for breach of contract, as to a claim for the contract price. Lord Blackburn rests the judgment mainly upon the "*Bankers' Case*" (3), which was a suit for annuities granted by letters patent under the great seal; but his Lordship at the same time points out that, from the time of Lord Somers, there had been repeated expressions of opinion by eminent judges in favour of the view that a petition of right lay against the Crown on a contract. It is unnecessary to cite these opinions, which are all collected in *Thomas* v. *The Queen* (2). Their Lordships may, however, refer to the accurate exposition of the law given by the late Cockburn, C.J., in *Feather* v. *The Queen* (4):—"We think it right to state that we see no reason for dissenting from the conclusion arrived at by the Common Pleas in *Tobin* v. *The Queen* (5). We concur with that Court in thinking that the only cases in which the petition of right is open to the subject are, where the land, or goods, or money of a subject have found their way into the

(1) 16 C. B. (N.S.) 355.
(2) Law Rep. 10 Q. B. 31.
(3) 14 How. St. Tr. 1.
(4) 6 B. & S. 293.
(5) 16 C. B. (N.S.) 310.

possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money, or when a claim arises out of a contract, as for goods supplied to the Crown or to the public service." Their Lordships desire to add, that upon this branch of the case they agree with the reasoning of Ritchie, C.J., and the able judgment of Mr. Justice Fournier.

It was argued for the respondents that no breach of the agreement of 1871 was committed by the Crown, inasmuch as the taking possession of the Windsor Branch Railway on the 1st of August, 1877, was simply the tortious act of Mr. Brydges. The argument fails because it has no foundation in fact. The respondent in his statement of defence alleges that, on or about the 25th of July, 1877, the Government of Canada, having completed arrangements for transferring the line to the Western Counties Railway Company, a minute was passed by the Governor General in Council directing that the arrangements then existing with the appellant company should be terminated on the 1st of August, 1877; that the Minister of Public Works was directed to resume possession on that day; and that, "in pursuance of the said minute of Council and of the said Act of 1874," the officers of Her Majesty dispossessed the appellant company and gave possession of the line to the Western Counties Railway Company. It is plain, therefore, that Mr. Bridges acted with the full authority of the Government, and merely carried out their instructions, which were issued in the belief that it was within their legal right to put an end to their agreement with the appellant company.

Another argument submitted on behalf of the respondent was to the effect that the Crown is only liable in respect of breaches of contract occasioned by the omissions of Crown officials, and is not liable in respect of breaches due to their positive acts, even when these acts are done under direct authority from the Crown. Upon this point it is sufficient to say that, in the opinion of their Lordships, there is neither authority nor principle for recognising any such distinction.

It was also argued for the respondent that the Crown cannot be held liable as for breach of contract, inasmuch as all the acts

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of the Government of Canada in putting an end to the possession of the appellant company, were done (to use the language of Mr. Justice Strong) "expressly with the intention of acting in pursuance of the statute of 1874, and for the purpose of carrying out the provisions of that statute, a duty which Parliament had imposed on the executive Government." If the effect of the Canadian Act of 1874 (37 Vict. c. 16) had been to make it the imperative duty of the Government to terminate their agreement with the appellants, and to give possession of the Windsor branch to the Western Counties Railway Company, the Crown would have incurred no liability to the appellants by performing that statutory duty. But the decision of this Board in the previous suit was given in favour of the present appellants, on the very ground that the Act of 1874 did not affect the validity or subsistence of the agreement of September, 1871, and imposed no obligation on the Government to interfere with the appellants' possession of the Windsor Branch Railway, or to transfer it to the Western Counties Railway Company.

The only matters remaining for consideration are the extent to which the Crown is liable for damages, and the amount of damages which ought to be awarded to the appellants. Their Lordships are of opinion that, on the 1st of August, 1871, when they were ousted by the act of the Crown, there arose to the appellants a claim of damages, for loss of possession, during the whole remainder of the term specified in the agreement of 1871; and that their subsequent restoration, in December, 1879, had merely the effect of reducing the amount of that claim. They are unable to assent to the view taken by Mr. Justice Henry, who was of opinion that damages must be restricted to the period between the 1st of August, 1877, and the 19th of September, 1878, the date when the petition of right was presented.

It has been argued, however, for the respondent, and the Supreme Court of Canada has, by a majority, given effect to the argument, that the appellants can only recover from the Crown such damages as were incurred by them whilst the Crown was in actual possession of the Windsor Branch Railway. It is said that the appellants are estopped from preferring any claim against the Crown, after the 24th of September, 1877, by reason

of their having elected to accept the Western Counties Railway Company as their sole debtors for damages accruing subsequently to that date. In the opinion of their Lordships, the plea thus advanced by the respondent is without foundation either in fact or law, and must therefore be rejected.

The respondents' statement in defence contains no plea of estoppel, and no allegation of fact, upon which such a plea could be founded. The argument has been based upon the print of proceedings in the equity suit, which was tendered by the respondent, at the trial of the present cause before Mr. Justice Gwynne, and received de bene esse. Even if it were competent in these circumstances to entertain the plea of estoppel, their Lordships would be of opinion that no case of election has been made out. Both suits were depending long before an operative judgment was pronounced in either of them. In the suit directed against the Western Counties Railway Company, which prayed, inter alia, for an account of profits, although the appellants were found to be entitled to the judgment of the Court in their favour, there has been no order directing an account to be taken, none has been taken, and no decree has been made ordaining the defendant company to make a money payment to the appellants. Had there been such a decree, any payment made under it by the Western Counties Railway Company would have operated in satisfaction pro tanto of the liability of the Crown, it could have had no other effect.

Their Lordships have accordingly come to the conclusion that the appellants are entitled to judgment for the whole damage sustained by them from the 1st of August, 1877, to the 1st of December, 1879. The evidence as to the amount of damage lies within a very narrow compass; it is not contradictory, and involves no question as to the credibility of witnesses. In these circumstances, their Lordships have thought it better, in order to obviate the necessity of further litigation, to determine the amount of damages themselves, and they have accordingly assessed the same at $115,000.

Their Lordships will humbly advise Her Majesty that the cross appeal should be dismissed and the judgment appealed from in the original appeal, in so far as it orders and adjudges "that the

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appellants, the suppliants, are entitled to recover from the respondent, Her Majesty the Queen, the profits of the Crown from the Windsor Branch Railway from the 1st day of August, 1877, to the 24th day of September, 1877, both inclusive, which have been fixed and determined at the sum of $9589. 07, being portion of their relief sought by the petition of right," ought to be reversed; and that quoad ultra the said judgment ought to be affirmed, subject to the declaration that the appellants, the suppliants, are entitled to receive from Her Majesty the Queen the sum of one hundred and fifteen thousand dollars ($115,000), as the damages suffered by them by reason of their having been deprived of the possession and use of the Windsor Branch Railway from the 1st of August, 1877, to the 1st of December, 1879. Their Lordships also find that the appellant company are entitled to receive the costs incurred by them in the principal and cross appeals.

Solicitors for appellants: *Bircham & Co.*
Solicitors for the Queen: *Bompas, Bischoff, Dodgson, & Coxe.*

[PRIVY COUNCIL.]

WENTWORTH . . . . . PLAINTIFF;

AND

HUMPHREY . . . . . DEFENDANT.

J. C.*
1886
July 20, 21.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Real Estate of Intestates Distribution Act, 1862.

The intention of the New South Wales Real Estate of Intestates Distribution Act, 1862, was to introduce a new rule of succession to real estate, and to enact that in cases of intestacy it should be administered and should devolve precisely as chattels real did before:—

Held, reversing the decision of the Supreme Court, that such rule applies to all cases, and not merely to those cases in which the dead owner has actually left an heir.

APPEAL from a decree of the Supreme Court (Nov. 15, 1884) reversing a decree (March 14, 1884) of Faucett, J. (sitting for the Primary Judge in Equity), and dismissing the appellant's claim with costs.

The original suit was instituted on the 24th of April, 1883, by the appellant to enforce the specific performance of a contract for the purchase, by the respondent, of certain land and warehouses in Sydney for the sum of £19,000. The respondent did not dispute the contract, but objected that a good title had not been made out to the property agreed to be sold, and the Supreme Court determined that the respondent's contention was correct.

The facts are stated in the judgment of their Lordships.

The respondent's requisitions and objections on the title were substantially as follows:—

(1.) That the legal estate in the said lands contracted to be sold was outstanding in John Beeson or his representatives.

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(2.) That previously to the conveyance of the equity of redemption in the said lands to Abraham Elias, the same had been conveyed or released to one Peter William Plomer by certain indentures of the 9th and 10th days of October, 1845.

(3.) That the appellant had not furnished any sufficient or satisfactory evidence that Abraham Elias the younger died intestate or unmarried.

(4.) That if Abraham Elias the younger died intestate and without heirs in the year 1865, his remainder in the lands passed to the Crown on his death by way of escheat, and could not be dealt with by the Curator of Intestate Estates under the Real Estate of Intestates Act, 1862, so as to enable him to convey the legal estate.

The Supreme Court held in effect that if Abraham Elias the younger died without heirs, then the lands vested in him at the time of his decease were not lands which upon his death intestate in respect thereof would pass to his heir-at-law, and therefore such lands would not vest in his personal representative under the Act of 1862, and the Curator of Intestate Estates had no power to convey the same to the respondent. Windeyer, J., dissented, on the ground that even if Abraham Elias the younger died without heirs, nevertheless the lands which were vested in him at the time of his decease, being lands in their nature heritable, would under the said Act vest in his personal representative and that the Curator had power to convey the same to the respondent.

The opinion of the Chief Justice and Innes, J., was as follows :—

"The Act 26 Vict., No. 20, was, as both its title and preamble state, 'An Act to alter the succession to real estate in cases of intestacy.' Accordingly it does not declare that 'all land,' without distinction, shall, 'on the death of the owner intestate," vest in his personal representative, but such vesting is confined to 'all land which, by the operation of the law relating to real property now in force, would, upon the death of the owner intestate in respect of such land, pass to his heir-at-law.' Now, in the case of land owned by a bastard dying unmarried, it is clear

that such land is not land which, by the operation of the law relating to real property, could pass to such owner's heir-at-law, because in that case there could be no heir-at-law. We have already said that the evidence does not sufficiently establish that Abraham Elias the younger died unmarried and without legitimate issue, and that therefore the defendant ought not to be compelled to accept a title dependent upon that assumption. In reference to the present point we, in like manner, came conversely to the conclusion that it is not shewn that Abraham Elias the younger was married and left legitimate issue. If that were not the case, then Abraham Elias the younger having died without the possibility of an heir to whom his real property could have descended, the statute which was passed solely to vest in the personal representative of an intestate that which his heir otherwise would have taken cannot apply. It follows from this that the Curator of Intestate Estates, who, by the 6th section of the Act, is placed in the position of a personal representative of an intestate, had no power to deal with the real estate of Abraham Elias the younger. If he died without an heir his property passed either to the Crown or to the representative of the original grantee John Beeson, who obtained the grant from the Crown after he had sold and conveyed to the person through whom Abraham Elias the younger derived his title, on the principle upheld in *Burgess* v. *Wheate* (1). It is unnecessary to say whether or not John Beeson's representative is so entitled as possessing the legal estate, because, in that case also, the curator would have had no power to convey, and the defendant could not be compelled to accept the title made out."

The question decided in appeal was as to the true construction and effect of the Act, about which the judges in the Court below had differed.

Sir *Horace Davey*, S.G., and *Owen*, Q.C. (Dr. *Serrell* with them), for the appellant, contended that the Act in question, according to its true construction, see especially sects. 1 and 6, applied to all real property of an intestate which is capable of descending to an heir (if any), and is not limited in its application to those

(1) 1 Eden. 77.

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cases where there is an heir in existence and capable of taking. The intention is to change the law of succession absolutely, not in particular cases. They cited Dwarris on Statutes, p. 524; *Burgess* v. *Wheate* (1); in reference to the contention that this wider construction of the statute interfered with the rights of the Crown by preventing escheats on failure of heirs. Here the legal estate was at the death of the deceased outstanding in Beeson, and there could not be an escheat of an equitable estate. Further, the Crown had remitted whatever rights it possessed. The curator accordingly had a complete power of disposition, and his conveyance was all that the respondent was entitled to.

Farwell (*Rigby*, Q.C., with him), for the respondent, contended that the appellant had not made out a title which could be forced upon an unwilling purchaser. There was no evidence that Abraham Elias the younger had died without issue. The Act of 1862 did not on its true construction apply where there was no heir in existence and ought not to be so construed as to interfere with the rights of the Crown which was not specially named in the Act: see Chitty on Prerogative, pp. 382, 226. The waiver of the proceeds by the Crown did not operate as a regrant by the Crown in favour of the appellant, and did not operate to strengthen his title. Inquisition must be made before regrant: 36 Edw. 3, c. 13; 8 Hen. 6, c. 16; see also *Doe* d. *Hayne* v. *Redferns* (3). The object of the Act of 1862 was to change the devolution of the property ab intestato, not to interfere with rights which are paramount, e.g., those of the Crown or those of Beeson's representative under *Burgess* v. *Wheate*. Besides, as Beeson was beneficially interested, the vesting order made under the Trustee Act, 1850, was ineffectual. And as regards waiver by the Crown, 47 & 48 Vict. c. 71, s. 6 shews that an Act of Parliament was here required to make it effectual. Upon the subject of costs *Phillipson* v. *Gibbon* (3) was referred to.

The counsel for the appellant were not called upon to reply.

(1) 1 Eden. 177. (2) 12 East, 96, 103.
(3) Law Rep. 6 Ch. 428.

July 24. The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

This is a suit for specific performance of a contract by which the plaintiff agreed to sell and the defendant to buy certain lands in the city of Sydney. The defendant, who is the present respondent, objects to the plaintiff's title as insufficient. The governing question is whether on the death of one Abraham Elias, who was absolutely entitled to the property, it was to be treated as of the nature of freehold or as a chattel real. If the latter, the plaintiff has purchased it of the legal personal representative of Abraham Elias, and, subject to any prior interests, has an indisputable title.

This question turns on the construction of the Colonial Statute called the Real Estate of Intestates Distribution Act, 1862. The preamble of the Act runs thus:—"Whereas it is expedient to alter the law relating to the succession to real estate in cases of intestacy." The operative part of the Act material for the present purpose consists of sect. 1, and the first sentence of sect. 2. They are as follows:—

"1. From and after the passing of this Act, all land which, by the operation of the law relating to real property now in force, would, upon the death of the owner intestate in respect of such land, pass to his heir-at-law, shall instead thereof pass to and become vested in his personal representatives in like manner as is now the case with chattel real property.

"2. Lands held in trust or by way of mortgage passing under this Act shall be subject to the same trusts and equities as the same would have been subject to if they had descended to the heir; and all other lands so passing shall be included by the administrator in his inventory and account, and be disposable in like manner as other personal assets, without distinction as to order of application for payment of debts or otherwise."

The property in question was devised in the year 1856 to Harriet Elias for life, with remainder to Abraham Elias, son of Rosetta Elias, and his heirs. In the year 1877 Harriet Elias died, and the remainder to Abraham fell into possession. But he had died in the year 1865 at the age of twenty years. It

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has been the subject of a great deal of dispute whether there has been any sufficient proof that he died unmarried, and without issue, but it is not a material question. He was certainly a bastard, and had no next of kin to him in the Colony. His personal estate, therefore, fell within the provisions of the Act 11 Vict., No. 24, and on the 12th of April, 1877, the Supreme Court made an order empowering Mr. Slattery, the Curator of Intestate Estates, to collect, manage, and administer the estate of Abraham. Slattery, treating the property now in question as subject to his administration, sold it by auction, and on the 18th of July, 1878, conveyed it to the appellant, who had bought it at the auction for the sum of £7569. This sum was paid into Court to the account of the estate, and after payment of expenses the balance was paid out to Rosetta Elias, the mother of Abraham, in whose favour the Governor and Council of the Colony had, under the advice of the Attorney-General and the Minister of Justice, waived the claims of the Crown. The appellant bought up an annuity charged upon the property in favour of Rosetta, and so became complete owner of the property, if Slattery had the right to sell it.

The case was heard before Mr. Justice Faucett, who considered that the appellant was bound to get in a legal fee simple vested in one John Beeson or his heir, and also a charge created in favour of a Mr. Plomer. This having been done, the cause came on for further hearing, and Mr. Justice Faucett made his final order decreeing specific performance and giving certain directions as to the purchase-money in accordance with the contract. He rested his decree on the conclusions that it was proved that Abraham Elias died intestate and unmarried, that his estate did not escheat to the Crown, and that the Crown, having a right to his property as ultimus hæres, had formally waived all right thereto, and that the Curator of Intestate Estates had power to sell and convey.

The Defendant appealed from this decree to the Full Court, who were of opinion that on the grounds assigned by Mr. Justice Faucett the title was not such as could be forced on an unwilling purchaser. The case was reheard upon the sole question whether Slattery could make a good title, when Chief Justice Martin and Mr. Justice Innes thought that he could not, and Mr. Justice

Windeyer that he could, although the last-mentioned learned judge still considered that the title was too doubtful to be forced upon an unwilling purchaser. The result was, that the decree of Mr. Justice Faucett was reversed, and the suit dismissed with costs. That is the decree now appealed from.

Their Lordships are of opinion that the intention of the Act of 1862 was to introduce a new rule of succession to real estate, and to enact that, in cases of intestacy, it should be administered and should devolve precisely as chattels real did before. The reasons for such a change are well known and need not be recapitulated here. One of them clearly appears on the face of the statute to be the payment of the intestate's debts, and that is a reason which must apply to all intestates, and not merely to those who happen to leave an heir-at-law. The words used to effect the object are not quite complete, and something must be implied to give them a full meaning. The Supreme Court has read them as meaning that the change of law is to take place only in those cases in which the dead owner actually leaves an heir to take his property. Their Lordships consider it quite as consistent with the grammar of the sentence to read it as meaning that the change is to take place whenever the intestate leaves property which, by force of the old law, would go to his heir if he had one. To express the same thing another way, they think that the words used are meant to describe the kind of property which is for the future to be treated as a chattel real, and not any particular state of an individual intestate's family.

No reason is assigned for the narrower construction except that the wider one disturbs the rights of the Crown, who is interested whenever there is no heir. There is no doubt that, owing to this change of law, the position of the Crown is changed in the cases in which there is no heir. The Crown might lose in some cases and gain in others. In the present case it would be a gainer, because, if the property is to be treated as under the old law, the Crown would take nothing on account of the legal estate outstanding in Beeson. But their Lordships are of opinion, first, that this general change of law of succession to property, founded on reasons applicable to all cases alike, is not prevented by the prerogative of the Crown from applying to cases in which, by acci-

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dental circumstances, the Crown is found to be a party interested; and, secondly, that the intention to abstain from touching cases in which the Crown happens to be interested is not to be imputed to the framers of the statute.

The inconvenience of the limit which the decision under appeal places on the statute is very serious, especially in those cases in which it is desirable to apply the machinery of the 11 Vict. No. 24. It would be necessary in every case to abstain from action until it had been ascertained whether the deceased owner had or had not left an heir, an inquiry which is often a long and difficult one. Arguments ab inconvenienti must be used with great reserve when they are opposed to the grammar of a statute, but are of great weight in determining between two constructions, each consistent with the grammar.

The only other point made in the argument which their Lordships think it necessary to notice now relates to the outstanding legal estate of Beeson. That has been got in, not by conveyance from his heir, but by vesting order under the Trustee Act, 1852. It is said that the order was inoperative because, there being no cestui que trust, Beeson's heir was not a trustee. But that Beeson and his heirs were bare trustees is clear. It might be that under the old law they could have retained their estate because there was no hand to take it away from them. But as the property is subject to the Act of 1862, Slattery was clearly entitled to have the legal estate got in for the purpose of administration, and that right he has passed to the appellant.

Their Lordships consider that the full Court should have dismissed with costs the appeal from Mr. Justice Faucett's decree, and that should now be done. The declarations contained in that decree with respect to Abraham Elias and to the interests of the Crown are not necessary and perhaps not sufficient to support it, and their Lordships would not make them if they were dealing with the matter de novo. But it also contains the declaration that Slattery had power to sell and convey, which their Lordships consider to be the true foundation of the decree. It is not worth while to alter it by expunging the useless matter. Their Lordships do not know what has been done with the deposit of £5000 made by the respondent, and it may have

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become necessary to follow a course different from that directed by Mr. Justice Faucett with regard to that deposit and to the payment of the residue of the purchase-money. But they conceive that it will be sufficient if Her Majesty directs that Mr. Justice Faucett's decree shall be restored, and that the Courts below shall make such further orders as are necessary, if any are so, for the proper payment of the purchase-money. They will humbly advise Her Majesty to that effect. The respondent must pay the costs of the appeal.

Solicitors for appellant: *P. T. Gordon & Son.*

Solicitors for respondent: *Field, Roscoe, Field, Francis, & Osbaldeston.*

[PRIVY COUNCIL.]

J. C.* 1886 June 10, 11, 25.

SALMON . . . . . PLAINTIFF;

AND

DUNCOMBE AND OTHERS . . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Construction of Statute—Intention of a Statute—Operative Words—Surplusage rejected.

Where the main object and intention of a statute are clear it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used.

The clearly expressed intention of Natal Ordinance No. 1 of 1856 was to give to any subject of the Queen resident in Natal the power of disposing by will according to English law of property both real and personal, which otherwise would devolve according to Natal law. Sect. 1 was operative for that purpose except that it concluded with the provision "as if such subject resided in England," the effect of which is to leave both the lex situs and the lex domicilii in operation, thus reducing the section to a nullity:—

Held, that these words ought not to be so construed as to destroy all that has gone before, and therefore should be treated as immaterial, the powers conferred not being affected by the question of residence in England.

APPEAL from a decree of the Supreme Court (Dec. 2, 1884) which decided against the appellant's claim to the whole of the

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property in suit, and in favour of the claim in reconvention of the respondents.

The appellant was the second husband of Charlotte Salmon, who died possessed of immovable property in Natal, having by will devised and bequeathed all her property to the appellant, and appointed him executor of her will. The effect of the decree was to adjudge that under the law known as Hâc edictali, each of the respondents, Robert, Samuel, and Frank Duncombe, who were the surviving children of the appellant's wife by her first husband, Robert Duncombe, was entitled to one fourth undivided share of the property, and the appellant to the remaining one fourth.

The facts of the case and the proceedings in the suit appear in the judgment of their Lordships. It may be here stated that Natal became a British possession in 1842, and that in 1844 the district of Natal was annexed to the settlement of the Cape of Good Hope. By Cape of Good Hope Ordinance No. 12 of 1845, sect. 2, the Roman-Dutch law, which includes the lex hâc edictali, was made the law of Natal.

In their judgments on the exceptions the judges (Cadiz and Wragg, JJ.) dealt with a question raised by the appellant as to the effect of Ordinance No. 1 of 1856, which the appellant contended enabled any subject of the Queen having property in Natal to dispose of it by will as an Englishman could in England property situated there. They held that in any case the rights of the respondents were not defeated by the ante-nuptial contract, inasmuch as they were born before this Ordinance came into operation, and their rights (according to the Roman-Dutch law) vested in them as soon as they were born, and could not be defeated by their mother's contract with her second husband.

Upon the cause coming on for trial the same questions were in issue as those decided on the hearing of the exceptions. The Court including the Chief Justice were unanimous in their decision, though their reasons differed.

The proceedings in the Court below are reported in 5 Natal Law Rep. N. S. p. 539.

Wood Hill (Sir *Horace Davey*, S.G., with him), for the appellant,

contended that Mrs. Salmon, the testatrix, had the right to dispose of the whole of her property in Natal by will, under which the respondents took nothing. The appellant and his late wife were natural-born subjects of Her Majesty. They were domiciled in England, though they resided in Natal at the time of their marriage, which took place in the colony. They jointly executed an ante-nuptial contract pursuant to Ordinance No. 1 of 1845, sect. 3. The clear intention and, it was submitted, the legal effect of the Ordinance of 1856 (the last words of sect. 1 being mere surplusage and without meaning) was therefore to empower the testatrix to dispose of her property as she had done. Accordingly her will defeated any claim which the respondents would otherwise have had to what the local law of the colony recognises as their legitimate portions. As regards the question of the respondents having had vested rights or interests before the marriage contract which could not be defeated thereby, sect. 2 of the Ordinance shewed that if they had any vested rights such would be defeated by the retrospective action of the Ordinance. The respondents were, however, natural-born subjects of the Queen, and had not, either by English or Roman-Dutch law, any interest vesting in them at the time of their mother's second marriage in property which she might subsequently acquire and die possessed of. Their claim was that they had vested interests in property to which their mother was not then entitled, such as to restrict her from making the marriage settlement. Such claim was inadmissible, and the marriage contract being intra vires the operation of the Ordinance followed.

Israel Davis, and *Evans Austin*, for the respondents, contended that the Ordinance No. 1 of 1856 was limited as to its operation to persons settled and resident in the colony, and did not according to its true construction empower the testatrix in this case to dispose of the property as by her will. It gave her no power to dispose of property in the colony as if both she and the property were in England; which is the effect of the contention on the other side. Moreover, if it had done so, she would under English law be incompetent as a married woman to devise land. Besides, the rights and interests of the respondents (that is their title to their legitimate portions of the estate which might belong to

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their mother at her death) were paramount to the alleged right of the testatrix. Those rights were vested in them, and were not cut down by the Ordinance of 1856 or the marriage contract of 1857, both which were of a later date than that of their birth.

Reference was made to Van Leeuwen, p. 745, and Van der Linden, bk. I., sects. 4, 5; to the Codex, lib. v., tit. ix., De secundis nuptiis, para 6, hâc edictali, &c.; to be found also in Burge's Commentaries, vol. i., p. 329; Codex, 5–18–7, and 5. 13; *Udny* v. *Udny* (1); *Natal Land, &c., Company* v. *Good* (2).

Wood Hill replied.

1886 *June* 25.

The judgment of their Lordships was delivered by

LORD HOBHOUSE:—

The sole question is whether under the terms of the Ordinance No. 1 of 1856 Charlotte Salmon had the power of giving her property to her husband, the appellant; for if she had the power she has undoubtedly made the gift. The respondents contend that she was prevented from so doing partly because they can claim legitimate portions and partly by force of the law known as Hâc edictali, Codex, lib. v., tit. ix., pl. vi.

The facts which raise the question are few and simple. Charlotte Salmon was twice married. The Respondents are the children of her first marriage. The second marriage took place at Durban in Natal on or soon after the 25th of February, 1857. On that day she and the appellant executed an ante-nuptial contract the terms of which will be presently mentioned. Mr. and Mrs. Salmon continued to reside in Durban till the year 1874, and during that time she acquired the real or immoveable property in Durban which is the subject of the present dispute. On the 14th of January, 1874, she made the will in question, constituting the appellant her executor and sole heir. She then left the colony with the intention of dying in England, being then afflicted with a fatal though lingering disease. She did die in England in February, 1880. There are two children of the second marriage, and they are parties to the suit, but they have

(1) Law Rep. 1 H. L., Sc. 441. (2) Law Rep. 2 P. C. 121.

disclaimed interest in favour of their father, and do not appear upon this appeal.

The Roman-Dutch law, of which the law Hâc edictali is part, was made the law of Natal in the year 1845. The effect of the law is that if a widow having children marries again, she shall not give to her husband any share of her property, however acquired, larger than the smallest share to which any of the children is entitled. If she does make a gift of the prohibited kind, the excess amount given by her to her husband is to be divided among the children of the former marriage. The same rule is applied to a man marrying a second time. It is clearly aimed at discouraging second marriages, to which it affixes consequences which are calculated to put the children of the first marriage in a much more favourable position than if their parents remained in a state of widowhood, and to operate with great harshness on the second family.

In the year 1856 was passed the Ordinance which has now to be construed; it is entitled,—

"Ordinance to grant to certain natural-born subjects of Great Britain and Ireland, resident in this district, the right to dispose by last will and testament of their real and personal property according to the law of England."

The preamble is as follows:—

"Whereas it is expedient to exempt persons settled in this district, being natural-born subjects of the United Kingdom of Great Britain and Ireland, from the operation of the laws in force in this district relating to testamentary dispositions of property, both real and personal, and also to make provision for exempting such natural-born subjects of the United Kingdom of Great Britain and Ireland from the said law in cases of marriage contracted within this district."

Then it is enacted by sect. 1:—

"1. Any natural-born subject of Great Britain and Ireland resident within this district may exercise all and singular the rights which such natural-born subject could or might exercise according to the laws and customs of England in regard to the

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disposal by last will or testament of property, both real and personal, situated in this district, to all intents and purposes as if such natural-born subject resided in England."

Sect. 3 provides that natural-born subjects who shall, after the passing of the Ordinance, enter into marriage within Natal shall not be entitled to exercise the rights aforesaid unless an ante-nuptial contract be made by the parties, agreeing to reserve the exercise of the rights contained in the 1st section.

Sect. 2 makes an analogous provision for persons already married at the date of the Ordinance. The expression "natural-born subjects" is defined to mean all the Queen's subjects.

By the ante-nuptial contract of February, 1857, it was agreed—

"That all inheritances, legacies, gifts or bequests which may be left or bequeathed to either of the said intended consorts, shall be the property of him or her to whom they shall have been left or bequeathed, with liberty, except with respect to the donation inter vivos hereinafter made, to dispose of the same by will, codicil, or other testamentary disposition in such manner as he or they shall think fit."

And after a recital which does not mention but evidently refers to the Ordinance of 1856, the intending husband and wife declare—

"That they wish to enjoy the same rights and privileges of devising all the property which they or either of them now possess, or which they may hereafter possess, of any nature or kind soever, both moveable and immoveable, as they would be entitled to do and exercise under the laws and customs of England; and that, in case of the death of the said parties or either of them, no division or distribution of their property shall be made according to the colonial law on that head."

The suit was raised by the appellant, who claimed to have a transfer of the property which was registered in the name of his wife, and also a declaration that he was entitled to the whole of the property and estate of his wife. To this suit the registrar of deeds and both sets of children were made parties. The registrar and the children of the first marriage pleaded in bar of the claim,

and the children in reconvention further claimed to have their mother's will declared inofficious, and to have decreed to them their legitimate portions and also the portions accruing to them under the law Hâc edictali. The appellant excepted to the registrar's plea and to the claim in reconvention, and his exceptions were heard and overruled by the Supreme Court, consisting of Mr. Justice Cadiz and Mr. Justice Wragg. The suit then proceeded to a hearing before the same two judges together with the Chief Justice. The members of the Court were unanimous in their decision, though not in their reasons. By the decree the property is divided equally between the appellant and his three stepsons, the registrar is absolved from the instance, and the appellant is saddled with the whole costs of the suit. He does not dispute the decree so far as regards the registrar, but he seeks in this appeal to have the rest of it reversed.

The decision of the Chief Justice is founded on the conclusions to which he had come a short time before in a similar case known as *London's Case* (1). He considers that, though the Ordinance of 1856 was clearly framed for the purpose of giving to all the Queen's subjects the option of devising property in Natal as freely as they could devise property in England, it has, owing to faulty expression, wholly failed of effect. This view has been supported at the bar by the respondent's counsel with great ability and resource. It cannot be expressed more clearly than in the words of the Chief Justice in *London's Case*: "No powers are given by sect. 1 except such as a resident in this colony could exercise if he resided in England, but his residing in England might not prevent his being legally domiciled in Natal, and the law of the domicil generally governs the devolution of moveable property. But even if he not only resided in England but was legally domiciled there, he, by the laws and customs of England and of other countries, would be controlled in respect of immoveable property in Natal by the lex situs, by the law of Natal." He considers that the intention of the legislature cannot be effected unless the words at the end of the section are altered in a way which would be legislation rather than construction. Upon this view, if the word "resident" be construed in its ordinary

(1) 3 Natal L. R. N. S. p. 1.

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sense, and their Lordships see no reason for construing it otherwise, the Ordinance effects nothing at all. And even if the word "resident" be construed to mean "domiciled," the Ordinance effects nothing so far as regards real property. For the purposes of the argument founded on failure of intention, it does not make any great difference which construction is given to the word "resident."

It is, however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used. And they have set themselves to consider, first, whether any substantial doubt can be suggested as to the main object of the legislature; and, secondly, whether the last nine words of sect. 1 are so cogent and so limit the rest of the statute as to nullify its effect either entirely or in a very important particular.

As to the broad intention of those who framed the Ordinance, their Lordships cannot find that anybody has ever intimated a doubt, nor do they find it possible to entertain one, that it was intended to give to all the Queen's subjects, resident or settled in Natal, the option of disposing by will according to English law, of property both real and personal which otherwise would devolve according to Natal law. The title may be looked at for aid in finding out the object. The preamble is of great importance in finding out the object. They have been quoted above, and nobody who reads to the end of the preamble and there stops, can doubt that the object is to provide a substantial measure substituting English law for Natal law in the cases mentioned.

That object is carried into effect by sect. 1, on which the subsequent sections turn. Now suppose that sect. 1 ended with the words "in this district" or with the words "intents and purposes." Though it would then be very inartificially drawn, it would not be difficult to construe it so as to give effect to the before declared object. The conditional words "could or might exercise" would require the implication of an unexpressed condition; otherwise the sentence would result in a nullity. But

the implication would be by no means a difficult one. By implying after the words "customs of England" the addition "over property subject to those laws and customs," the enactment would become sensible and harmonious.

The difficulty is, and their Lordships quite agree that it is a great difficulty, that a condition which is apparently and at first sight the correlative condition of the conditional words "could or might exercise" is expressed by the last nine words of the section. And the question is whether that expression excludes all other implication. If such a construction left a substantial operative effect to the enactment, it might be necessary to answer that question in the affirmative; but, as it destroys the expressed objects altogether unless the word "resident" be construed to mean "domiciled," and in that case destroys the expressed objects so far as regards real property, their Lordships answer it in the negative. It is true that they cannot find a sensible meaning for the nine words in question. Very likely the draftsman, whose want of skill is shewn by other expressions in the Ordinance, attributed to residence a legal effect which it does not possess. But he does not make the legislature say that the powers conferred are not to be any greater powers than would be conferred by a residence in England. He makes it in the rest of the section use terms which, with the easy implication that is necessary to give them meaning and to harmonize with the declared objects, confer the power of escaping from Natal law and coming under English law; and he then adds words which may add nothing to what has gone before, but which ought not without necessity to be construed so as to destroy all that has gone before. A man exercising the powers conferred does not in any way violate or contravene the nine words in question. He does exercise these powers as if he resided in England, because it is perfectly immaterial for their exercise whether he is supposed to reside in England or not, and because wherever he is supposed to reside he exercises them in the same way. It is very unsatisfactory to be compelled to construe a statute in this way, but it is much more unsatisfactory to deprive it altogether of meaning. Their Lordships chose the lesser of two difficulties.

Support is given to this view by the wording of sect. 2. As

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mentioned before, sects. 2 and 3 are complementary to one another, and they deal with the cases of marriages contracted before and those contracted after the Ordinance. In sect. 3 there is a simple reference to sect. 1; but in sect. 2 different language is used. It provides that persons married before the Ordinance may reserve to themselves the rights given by the Ordinance; provided that the parties to the marriage execute a deed testifying "their consent to such natural-born subject exercising all and singular the rights possessed by such natural-born subject as to the disposal according to the laws and customs of England by last will and testament, of property, both real and personal, situated in this district." Now the rights which may be reserved under sect. 2 are those given by sect. 1; and the form of the prescribed declaration clearly expresses the reservation of a right to dispose by will of property, both real and personal, in Natal according to the laws and customs of England. That is the very right which the Appellant contends to have been conferred by sect. 1, and which their Lordships, even without the aid of sect. 2, think that sect. 1 must be held to confer.

Then it is said that sect. 1 only enables persons resident in Natal to exercise the powers thereby given, and that Mrs. Salmon was not resident at Natal at the date of her death when her will took effect. It is not clear what her domicil was, nor does anything turn upon domicil, because, as intimated before, their Lordships construe the word "resident" in its ordinary sense. They cannot discover any reason why the powers conferred should be limited by either domicil or residence, and if they were to guess, would guess that the word "residence" had been used upon an erroneous view of its legal effect. Therefore not having any clue which leads them to any secondary meaning of the word, they must read it in its primary meaning. Now Mrs. Salmon was resident in Natal when she made the declaration which reserves to her the rights conferred by sect. 1, and also when she made the will which is an exercise of those rights. It is true that, until her death, the will was ambulatory, and might have been cancelled; but in the events that have happened it remains operative, and their Lordships are of opinion that the testatrix did, by her ante-nuptial contract and her will, exercise

the powers conferred by the Ordinance while she was resident in Natal.

The two learned judges who heard and disallowed the exceptions do not differ from the foregoing conclusions. The ground on which they decided the case against the appellant is that, prior to the passing of the Ordinance of 1856, the interests now claimed by the respondents were rights absolutely vested in them, and that they could not be touched by the Ordinance unless clear and positive words gave a retrospective force to its provisions. Now supposing that there were any such interests vested in the respondents, it would be very difficult to maintain in the face of sect. 2, which shews how persons already married are to avail themselves of sect. 1, that the Ordinance had not any retrospective effect. But their Lordships do not dwell upon that because they are unable to see how, when the Ordinance passed, the respondents had anything resembling a vested interest in this property. They had not even an expectancy; not even such a chance as an heir apparent has of succeeding to property vested in his ancestor. Their mother had no immoveable property when the Ordinance was passed; she might have aliened any that she afterwards acquired; and she might have survived any or all of her issue. Those contingencies affect all the interests claimed by the respondents. As regards the claims under the law Hâc edictali, those only accrued on the re-marriage of Mrs. Salmon. The canon of construction relied on by the learned judges, though expressed somewhat too absolutely, is a sound one, because it is generally bad policy for a legislature to disturb vested interests, and therefore primâ facie improbable that it should have done so. But to attribute the character of a vested interest to something which depends on the chance that a lady may acquire property, and on the chance that she may retain it till her death, and on the chance of survivorship between her and the expectants, and on the chance that she will marry a second time, is, in their Lordships' opinion, to give to that very remote possibility a substance which neither lawyers nor statesmen have ever attributed to such things. If this view of the majority in the Court below be correct, there is not a person born before the date of the Ordinance who would not have a right to

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claim the benefit of the displaced Natal law whenever it would bring him anything which he could not get by the substituted English law.

It was ingeniously argued by Mr. Davis that, supposing the case governed by English law, still the gift cannot take effect, for the English law would carry with it the disability of a married woman to devise land. That objection is answered by reference to the ante-nuptial contract. It appears that all of the property now in dispute cannot, if any of it can, be brought under the head of inheritance, legacy, gift, or bequest. But the later clause of the contract, by which the parties elect to come under the English law, does, in their Lordships' opinion, amount to a clear expression of intention that the husband and wife should have full testamentary power, each over their own property. That is by English law a permissible arrangement.

Their Lordships are of opinion that the Supreme Court should have given to the appellant the relief he asked, and that the proper course on this appeal is to discharge the decree except so far as it affects the registrar of deeds, to declare the appellant entitled to the whole of Mrs. Salmon's property, to reject the claim in reconvention, and to order the respondents to pay to the appellant the whole costs of the suit, except such as have been caused by the improper joinder of the registrar. They will humbly advise Her Majesty to this effect. The respondents must pay the costs of this appeal.

Solicitors for appellant: *Dawes & Son.*
Solicitors for respondent: *Atkinson & Dresser.*

[PRIVY COUNCIL.]

LEWIN AND ANOTHER . . . . . PLAINTIFFS; J. C.*

1886

AND

WILSON AND OTHERS . . . . . DEFENDANTS. *June* 5, 8, 25.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Law of New Brunswick—Consolidated Statutes, c. 84, ss. 29, 30—Limitation—Right to make Payments—Admission of Liability.

The rule that the only person whose payment on account will prevent foreclosure from being barred is the mortgagor, or his privy in estate, or the agent of either of them, must be qualified so as to include any person who by the terms of the mortgage contract is entitled to make payments.

Where H. and W. each mortgaged some property to the obligee of their joint and several bond, to secure the amount of the obligation, the latter as between the debtors being surety only, H. being bound to pay principal and interest and expressly named as a person entitled to redeem both mortgages, W. never having made any payment at all :—

Held, in a suit for foreclosure, that the period of limitation prescribed by sect. 30 of c. 84 of the Consolidated Statutes of New Brunswick ran in respect of both mortgages from the date of the last payment of interest by H.

APPEAL from a decree of the Supreme Court of Canada (Dec. 9, 1884), affirming a decree of the Supreme Court in Equity of New Brunswick (Oct. 7, 1882), and dismissing the appellants' suit for foreclosure.

The facts of the case are stated in the judgment of the Lordships.

The case is reported in 9 Supreme Court of Canada Reports, p. 646.

Sects. 29 and 30 of the New Brunswick Act are substantially a reproduction of 3 & 4 Wm. 4, c. 27, s. 40, and 7 Will. 4 & 1 Vict. c. 28.

Sir *Horace Davey*, S.G., and *R. Brown*, for the appellants, contended that the suit was not barred. Reference was made to the

* *Present:*—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

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Consolidated Statutes of New Brunswick, c. 84, sects. 29 and 30, and to c. 85, sects. 1 and 6, which latter sections reproduce to some extent 3 & 4 Will. 4, c. 42, s. 3, and 19 & 20 Vict. c. 97, s. 14. It was contended that these latter did not apply to the case, having reference only to personal actions, and that Henry, J., was wrong in founding his judgment upon sect. 6. The case it was contended was identical with *Chinnery* v. *Evans* (1) and *Harlock* v. *Ashberry* (2). There was only one debt, in respect of which Howe and White were jointly and severally liable. The proviso in White's mortgage put it beyond controversy that Howe was entitled to pay, and the mortgagee was bound to receive from him, the interest accruing due on the mortgage. The payments therefore being made by a person bound or entitled to make them within sects. 29 and 30 referred to, prevented the statute from running until the date of the last payment.

Millidge, of the Canadian bar, contended that the suit against White's executors was barred. Howe was neither liable nor entitled to pay the debt secured by that mortgage in such a sense as to be competent to prevent by a payment of interest the currency of the statute in favour of White. Howe was not the owner of the equity of redemption of White's mortgage, nor White's agent, nor agent for his executors. See *Toft* v. *Stephenson* (3); *Chinnery* v. *Evans* (4); *Bolding* v. *Lane* (5); *Harlock* v. *Ashberry* (2), in which latter case the person entitled to pay was considered to be a person standing in such a fiduciary position with regard to the owner of the land as to be competent to make an admission affecting such land. The right to make a payment valid to stop the statute is limited to the person entitled to make a binding admission or acknowledgment of the debt. See also *Newbould* v. *Smith* (6); *Bechervaise* v. *Lewis* (7); *Atkins* v. *Tredgold* (8).

R. Brown, replied.

(1) 11 H. L. C. 115, 129.
(2) 19 Ch. D. 539.
(3) 1 De G. M. & G. 28.
(4) 11 H. L. C. 129.
(5) 1 De G. J. & S. 122.
(6) 29 Ch. D. 882.
(7) Law Rep. 7 C. P. 372.
(8) 2 B. & C. 23.

June 25. The judgment of their Lordships was delivered by LORD HOBHOUSE:—

On the 27th of September, 1850, John Howe and James White gave a joint and several bond to secure the payment of £1000 to Margaret Cunningham on the 27th of September, 1855, with interest quarterly until payment of the principal. As between Howe and White the latter was a surety, but they were both principal debtors to the obligee.

On the same day each of them mortgaged some property to the obligee to secure the bond debt. White's mortgage is made upon the express condition that if he and Howe or either of them their, or either of their heirs, executors, or administrators, shall pay to Miss Cunningham or her representatives the sum of £1000 on the 27th of September, 1855, with interest in the meantime according to the conditions of the bond of even date, the mortgage deed is to be void, otherwise to remain in full force and virtue. A similar proviso for defeazance is contained in Howe's mortgage, the only difference being that Mary the wife of Howe is introduced as a party entitled to pay the debt.

The interest on the debt was paid regularly by Howe up to the 27th of March, 1879, after which his payments ceased. On the 20th of January, 1881, Miss Cunningham's representatives commenced the present suit for foreclosure and sale of the property comprised in both the mortgages. The right of entry accrued to the mortgagee on the 27th of September, 1850. Five years afterwards the mortgages became indefeasible at law and redeemable only in equity. White and his successors in title remained in possession of his mortgaged property from the date of the mortgage to that of the suit, and nothing has ever been done by them to give any fresh starting-point to the lapse of time. The successors in title are defendants in the suit, and they plead the Statutes of Limitation. The sole question is whether the payments of interest made by Howe prevent time from running in favour of White. No question arises on Howe's mortgage.

The cause was heard before Mr. Justice Palmer, Judge in Equity, who considered that White's property was protected by lapse of time, and dismissed the bill with costs as against the

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defendants claiming under him. As regards Howe's mortgage he made a decree for sale.

The plaintiffs then appealed to the Supreme Court of Canada against the dismissal of their bill, and as the majority of that Court agreed with Mr. Justice Palmer upon the point of limitation, the appeal was dismissed with costs. The present appeal is brought from the order of the Supreme Court of Canada. For the purpose of the hearing before that Court Mr. Justice Palmer reduced the facts into the form of a special case.

The enactment which governs the case is sect. 30 of c. 84 of the Consolidated Statutes of New Brunswick, being the chapter headed "Limitation of Real Actions," and it runs as follows:—

"It shall and may be lawful for any person entitled to or claiming under any mortgage of land to make an entry, or bring an action at law or suit in equity to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, such payment being made within twenty years after the right of entry first accrued, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in this chapter to the contrary notwithstanding."

This action is, excepting an addition which does not affect the present question, the same with the English statute 7 Will. 4 & 1 Vict. c. 28.

The question must turn on the relations between Howe, White, and Miss Cunningham, which, as it seems to their Lordships, have not been quite accurately appreciated. The three deeds are parts of a single transaction. There is no need to resort to extrinsic evidence for this conclusion, because in each mortgage the bond is imported into the proviso for redemption, or rather defeasance, for the mortgages are made in the older form of conveyances to become void on payment. Therefore by the express contract of the three Howe is bound to pay, and Miss Cunningham to receive, the money due on the bond. And by the same contract a tender by Howe of money according to the conditions of the bond is a good tender to defeat and avoid White's convey-

ance. It is true that after the 27th of September, 1855, there is no express contract. But that is the common case with both bonds and mortgages; a short time, usually a much shorter time than five years, is fixed for payment, but in fact the parties contemplate the continuance of the security till it suits one of them to put an end to it. That is the justification of the way in which Courts of Equity have dealt with such transactions. Therefore in the view of a Court of Equity all the terms of the contract which was expressly made to continue up to the 27th of September, 1855, remained unaltered after that date, and Miss Cunningham was just as much bound to receive money from Howe for the purpose of redeeming White's mortgaged property in equity, as she had before been bound to receive it for the purpose of avoiding his conveyance at law. The circumstance that, as between White and Howe, Howe was the principal and bound to exonerate White, does not alter their legal position as regards Miss Cunningham, but it fully accounts for the fact that Howe alone paid the interest.

The respondents, who claim under White, contend that the payment spoken of in sect. 30 is payment by the party sought to be charged in the suit or by his agent; and that no other payment will give a fresh starting-point of time. For this purpose they refer to the preceding sect. 29, and contend that according to the authority of decided cases the word "payment" in sect. 30 means payment by way of admission or acknowledgment, and must be limited as acknowledgment is limited in sect. 29, which they again say has been decided to mean acknowledgment by the party sought to be charged or by his agent.

The view of Mr. Justice Strong, who dissented from his brother judges in the Supreme Court of Canada, is that, under the circumstances of this case, Howe was the agent of White, so that under any construction of the statutes his payments would fall within the meaning of sect. 30. Their Lordships do not express any opinion to the contrary, but the appeal has been rested entirely on a plainer and broader ground, also relied on by Mr. Justice Strong, and to that ground their Lordships will confine themselves. It is however necessary for that purpose to see how far the authorities have determined the meaning of the word "payment" in sect. 30.

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Sect. 29 deals with actions to recover money secured on land and legacies, and provides a limit of twenty years after the right accrued, "unless, in the meantime, some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent;" a fresh term of twenty years being given after any such occurrence. It has been disputed whether the words which require that acknowledgment shall be given by the person by whom the money shall be payable or his agent, apply also to payment. It is argued that the cases of *Chinnery* v. *Evans* (1) and *Harlock* v. *Ashberry* (2) have decided that they do so apply. But that was not the ratio decidendi in either case. In both cases the question arose under the English Act of 1837, which corresponds with sect. 30 of the New Brunswick Statute, and not under sect. 40 of the English Act of 1833, which corresponds with sect. 29. In *Chinnery* v. *Evans* (1) payments by a receiver, appointed at the instance of the mortgagee over several mortgaged estates, were held sufficient to prevent time from running against the mortgagee with regard to all those estates, though in point of fact the receiver had only been in possession of one of them, and others had been sold by the mortgagor and been possessed by his grantees for seventy years. In *Harlock* v. *Ashberry* (2) the person making the payment was a tenant of the mortgaged land, an entire stranger to the mortgage contract, who paid to the mortgagee as landlord and by way of rent, not by way of answering the debt; and it was held, first, that the payment of rent was not a payment of principal or interest; and, secondly, that the tenant, having no interest in the matter except to pay his rent, was not a person who could make a payment of principal or interest within the statute. Their Lordships have not been referred to any case where it has been decided that payment made by some person concerned to answer the debt has been held to be insufficient to keep a right alive against the party charged in the suit merely because he was not that party or his agent.

It is remarkable that when the legislature speaks of payment

(1) 11 H. L. C. 115. (2) 19 Ch. D. 539.

alone it does not use any qualifying words. Perhaps it is more remarkable in the New Brunswick statutes, which were passed simultaneously in their present form, than in the English ones, between which there is an interval of time. Sect. 30 follows immediately on sect. 29, and it is not a mere careless copy of the English Act of 1873, as it contains an important alteration, which in such a case as *Chinnery* v. *Evans* (1) would have precluded the mortgagee from recovering. It was therefore the subject of consideration, and yet the legislature has chosen to use the word "payment" without any qualification such as is clearly attached to the word "acknowledgment" in sect. 29. It must be remembered that payment and acknowledgment are two very different things. As regards the person making them, acknowledgment may, as pointed out in *Bolding* v. *Lane* (2), be made by a person who, though a party to the mortgage contract, has ceased to have any substantial interest in it, and has nothing to lose by the acknowledgment; whereas, payment is certain to be made only by those who have some duty or interest to pay. As regards the recipient, so long as he is paid according to the intention of the contracting parties, he is in full enjoyment of his bargain, and is not put upon any further assertion of his rights; but not so if he only receives acknowledgment. If, therefore, we find that the legislature has used different language about the two cases, we must not readily conclude that it has done so by accident or without meaning it.

It is indeed agreed on all hands that the mortgagee may receive money, and money which when received he is bound to bring into account, which yet will not constitute payment within sect. 30. How the word "payment" should be construed has been the subject of discussion more than once, and the mode has been differently expressed by different judges, though probably with no essential difference of meaning. In *Harlock* v. *Ashberry* (3) the judges considered that the principle which underlies the statutes is that payment must be an admission of right, but they do not discuss the question how far a payment by A. may be an admission of right against B. Their conclusion is that statu-

(1) 11 H. L. C. 115. (2) 1 De G. J. & S. 122.
(3) 19 Ch. D. 539.

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tory payment must be by a person bound, or at least entitled, to pay; and that was quite sufficient for their decision. In *Chinnery* v. *Evans* (1) a more direct and simple criticism is applied both by Lord Westbury and Lord Cranworth to the word "payment." They consider that money brought in by a stranger to the mortgage contract would not have the characteristics or legal quality of payment; it would be a gift from a person not entitled to tender it to a person not entitled to demand it. Both learned Lords treat the supposed case as almost beyond the bounds of practical matters. But in *Harlock* v. *Ashberry* (2) payment by a stranger to the contract was found to have come about in a very natural way. A tenant of the mortgaged land, to whom it was wholly indifferent whether he paid to mortgagor or mortgagee as long as he got a receipt for his rent, paid to the mortgagee. And Sir George Jessel took the view that such a payment was not a payment of principal or interest under the statute of 1837. Without discussing which of these modes of exposition is the more satisfactory, their Lordships say that neither of them approaches a decision that the word "payment" in sect. 30 is to be construed as if it was actually followed by the words which in sect. 29 and in the English Act of 1833 are clearly attached to the word "acknowledgment." A wider range of exposition is allowable and has been taken. In expounding the word "payment" learned judges have used such expressions as were calculated to shew in the case before them that the payment relied on was or was not the payment meant by the statute. In this case their Lordships think it sufficient to say that payments made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the defeazance or redemption of the mortgage, are payments which by sect. 30 give a new starting-point for the lapse of time. And Howe was clearly such a person.

In the Supreme Court, Mr. Justice Henry rested his decision entirely on the 6th section of c. 85 of the Consolidated Statutes. That chapter is headed "Limitation of Personal Actions," and the 6th section is that which says that a joint contractor shall not be answerable for payments by his co-contractor. It is suffi-

(1) 11 H. L. C. 115. (2) 19 Ch. D. 539.

cient to say this case does not fall under that section, nor under that chapter.

The judgment of the three other judges who constituted the majority was delivered by Mr. Justice Gwynne. That learned judge relies partly on the enactment mentioned by Mr. Justice Henry, and more on the language of sect. 29 of c. 84, which, he says, is the statute directly bearing upon the point. He does not quote or discuss, or, except in a casual way, refer to, sect. 30, which is the governing enactment. His argument mainly goes to shew that acknowledgments and payments are put on precisely the same footing by sect. 29. He relies on the decision in *Bolding* v. *Lane* (1), where the question related to acknowledgment under the English Act of 1833, corresponding with sect. 29, and on the dictum in *Toft* v. *Stephenson* (2), which Lord Cranworth carefully confines to a case falling under the same enactment. The principle he finds to be established by authority is, that the only person by whom a payment can be made to stay the currency of the statute, is the mortgagor, or some person in privity of estate with him, or the agent of one of them. It will have been seen that their Lordships think it necessary to qualify that doctrine. But the learned judge having laid down that principle, goes on to find that the payments made by Howe were not made in the discharge of any contract of White contained in the mortgage; and that, in making those payments, he was as much a stranger to White's mortgage and the liability incurred thereby as any other person could have been. Their Lordships think that this view is quite inconsistent with the terms of a contract by which Howe was bound to pay the debt, and was expressly named as a person entitled to come in and work a defeazance of White's conveyance.

The special case raises a second question with respect to a parcel described as Lot No. 18. On this it is sufficient to say that it appears to their Lordships that, as regards that parcel, the mortgage of it was made subject to a lease dated the 30th of November, 1846, and certain covenants therein contained. It does not appear what interest is now subsisting in respect of that lease. Whatever it is, the mortgagee's rights are, according to

(1) 1 D. J. & S. 122.

(2) 1 De G. M. & G. 28.

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the statements in the case, postponed to it; but, subject to such interest, the right of foreclosure and sale exists with respect to this parcel.

Their Lordships are of opinion that the Supreme Court of Canada should have reversed the decision which was appealed from, and have granted to the appellants the relief prayed by them in respect of the property included in White's mortgage, subject to the outstanding interest in Lot 18, and have given to the appellants the costs of their appeal against the respondents. They will now humbly advise Her Majesty to make such an order in lieu of the decree of the Supreme Court. The respondents must pay the costs of this appeal.

Solicitors for appellants: *Linklater & Co.*
Solicitor for respondents: *Russell Cooke.*

J. C.* 1886 *July* 7, 8, 21.

LEDGARD AND ANOTHER . . . . . DEFENDANTS;

AND

BULL . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF THE NORTH-WEST PROVINCES OF BENGAL.

Patent Law Amendment Act, 1852, s. 41—*Sufficiency of Particulars of Infringement—Practice.*

The sole object of Indian Act XV. of 1859, s. 34, corresponding with sect. 41 of the English Patent Law Amendment Act, 1852, is to give the defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information be given in the plaint itself or in a separate paper.

Particulars of breaches must be distinguished from particulars of objection for want of novelty. In the latter case the particular instances may not be within the knowledge of the patentee and must be specified; in the former the defendant must know whether and in what respect he has been guilty of infringement.

Where three patents of the plaintiff all related to one article, a kiln for burning bricks, and the second and third in date were for improvements

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* *Present:*—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

upon the invention specified in the first, and the plaintiff alleged a particular kiln constructed and used by the defendant, and in his plaint not only referred to his patents, but indicated in the case of each of them the infringements which he complained of :—

Held, overruling the High Court, that this was a sufficient compliance with the Act.

Talbot v. *La Roche* (15 C. B. 310) and *Needham* v. *Oxley* (1 H. & M. 248) approved.

Appeal and suit, however, dismissed for want of jurisdiction to try it.

CONSOLIDATED APPEAL and cross appeal from an order of the High Court (Feb. 23, 1883) which in effect reversed a decree of the judge of Cawnpore (May 22, 1822) in favour of the respondent for the full amount claimed, and directed that the respondent's plaint be amended, presented in the proper Court, and then reheard on the merits, costs being directed to be costs in the cause.

On the 2nd of February, 1882, the respondent brought his suit in the Court of the subordinate judge of Cawnpore, which was afterwards transferred to the Court of the district judge. In his plaint, he alleged, very briefly, the substance of three specifications of invention, filed in 1872 and 1878 under Act XV. of 1859. He alleged that the first invention consisted of a continuous flame kiln for burning bricks, and of a particular method of loading and working such kiln. The description of the kiln was limited to a statement, that in it the continuous action or draught is caused and maintained by the use of moveable iron chimneys placed at intervals in the parts of the kiln where the burning of the bricks is to be effected. The description of the method was, that it consisted of placing the green or unburnt bricks in the kiln, in concentric continuous walls or lines, with parallel open spaces or draught passages between such walls or lines of bricks.

He alleged that the second invention consisted of an improvement in the said kiln, effected by providing vertical holes in the said concentric lines or walls, whereby fuel could be supplied from the top of the kiln by being lowered into the furnace, instead of through furnace mouths in the sides of the kiln, and of "other improvements" not described in the plaint. He alleged that the third invention consisted of a kiln formed by a trench dug into the earth, instead of the usual superstructure.

Then followed the paragraph material to the cross appeal.

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5. "The defendant, H. C. B. Petman, has used, and is now using in Cawnpore, a kiln, with two sets of operations, similar to that patented in manner above described by the plaintiff, and in such kiln the various inventions patented by the plaintiff, as aforesaid, have been made and used, without any license from the plaintiff, who therefore claims Rs.10,000 as royalty and damages."

The plaintiff did not deliver with his plaint, or at any time during the suit, separate "particulars of breaches."

Accordingly, on the 2nd of March, 1882, upon the case coming up to fix the issues, the defendant raised that objection, but the Judge held that the plaint contained sufficient particulars for the guidance of the defendant in framing a reply, and directed him to reply accordingly.

An application was made on the 7th of March, 1882, to the High Court, under sect. 622 of Act X. of 1877, to send for the record and set aside the last-mentioned order (which, it may be mentioned, was not appealable under sect. 588). Three days later, another application was made, that if sect. 622 should not be deemed to apply, the High Court would interfere under sect. 15 of the Charter Act of 1861. On the 20th of March, 1882, the High Court held that sect. 622 did not apply, and rejected the application.

On the 6th of April, 1882, after unsuccessful attempts to get the order of the 2nd of March set aside, the defendant, in pursuance thereof, filed his written statement, in which he contended that there was no valid suit before the Court, under Act XV. of 1859, to which he could be called upon to plead in the absence of "particulars of breaches." He denied any infringement, inasmuch as he had burnt bricks on his own process. The damages claimed were alleged by him to be arbitrary, excessive, and contrary to law.

Issues were settled, one being, has the defendant in any way infringed the patent as described in the plaint? On the case coming up for hearing the defendant objected to the whole of the evidence with regard to infringement, on the ground that "a distinct and specific statement of the various points in which infringement has taken place should have been given in the particulars—instead of being vaguely alluded to as in paragraph 5."

The objection was overruled, and the depositions of the plaintiff and of Walter Butler a civil engineer were taken.

At the adjourned hearing the defendant presented a petition, which, while stating that his counsel had protested vainly at the time that by admitting the evidence of the plaintiff the Court had allowed him, the plaintiff, to supplement the absence of particulars of breaches not filed with the plaint as required by law by evidence orally given by the plaintiff of such particulars, to the prejudice of the defendant's just rights of defence as put forward in his written statement, prayed that he might have reasonable time to file a defence supplemental to his written statement, giving particulars on which he claimed the right to resist the action of the plaintiff. In the alternative, he prayed that the Court would, without prejudice to those rights, admit evidence to prove that he had manufactured bricks, to all intents and purposes, on his own processes as detailed in the specifications and plans of manufacturing, for which the Government of India had granted him an exclusive right in the year 1873 and 1876; and that his mode of setting bricks, and his dampers, and his mode of firing from the top, and his trench system, were no infringements of the plaintiff's patents.

The Court refused either prayer of the petition, proceeded with the evidence and decreed in favour of the plaintiff for the full amount claimed.

The High Court, on the appeal of the defendant, held, on the 23rd of February, 1883, that sect. 34 of Act. XV. of 1859 had not been complied with:—"what is stated on the subject is nothing more than the general allegation contained in the 5th paragraph of the plaint" (cited above). "Sect. 34 further provides 'that at the trial of any such action or issue no evidence shall be allowed to be given in support of any alleged infringement or of any objection impeaching the validity of such exclusive privilege which shall not be contained in the particulars delivered as aforesaid,' so that the plaintiff came into Court without any case which could possibly be tried. The attempt made at the hearing to shew that the statement in the 5th paragraph of the plaint amounted to notice of particulars as required by the Act was only supported by going into matters which were outside the plaint

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altogether. How, in the face of such very plain and distinct directions as those contained in sect. 34 of the Act, the plaint should have been framed in its present form it is difficult to understand. The second reason of appeal must therefore prevail; but we will allow the plaintiff another opportunity of a hearing on the merits, and for that purpose we direct that the plaint be amended and presented in the proper Court, viz., the principal Court of original jurisdiction in civil cases at Cawnpore, and that with the plaint the particulars required by sect. 34 be duly delivered."

Other questions relating to procedure in the Indian Courts arose in the case, and appear in the judgment of their Lordships, and in a report of the case in Law Rep. 13 Ind. Ap. 134.

Aston, Q.C., and *Cowell*, for the appellants, contended that the High Court was right in holding that without particulars of breaches the plaintiff could not go to trial. This was a case of three patents for a particular process. The patents were inconsistent with one another. If there was any infringement it was by the process of taking one provision from this patent and another from that, and it was essential to the defendant to know what was the precise combination imputed to him as an infringement. The evidence as to the infringement by a moveable chimney was not covered by the particulars. [LORD WATSON:— The specific kiln on the defendant's premises is alleged to be an infringement of the patents. See *Needham* v. *Oxley* (1); *Talbot* v. *La Roche* (2); *Hull* v. *Bollard* (3).] Evidence of objection without particulars is inadmissible: *Sheen* v. *Johnson* (4), and so also of breaches.

R. S. Wright, and *Phillips*, for the respondent, contended that the District Court was right in holding that the plaint contained sufficient particulars of breaches. The time, place, and manner of the infringement were clearly set forth in the plaint. The parts of the patents alleged to have been infringed were described. The specifications and other documents were annexed shewing

(1) 1 H. & M. 248.
(2) 15 C. B. 310.
(3) 1 H. & N. 134.
(4) Ind. L. R. 2 All. 380.

clearly what was complained of. The kiln itself which constituted the infringement was on the defendant's premises, he knew the patents and he knew the kiln, and the allegation was that one was an infringement of the other, and he himself best knew how.

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Aston, Q.C., replied.

The judgment of their Lordships was delivered by

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LORD WATSON:—

These appeals are taken in an action of damages for the alleged infringement of certain exclusive rights secured to Mr. Bull, the plaintiff, by three Indian patents; and the whole controversy between the parties depends upon two pleas maintained by the defendant, the late Mr. Petman, who is now represented by his testamentary executors.

In his written statement, filed in answer to the plaint, before the district judge of Cawnpore, the defendant pleaded that the judge had no jurisdiction to entertain the suit, in respect it had not been regularly brought into Court, and to that plea he has adhered throughout all the subsequent stages of the litigation. The defendant also pleaded that the plaintiff had failed to comply with the provisions of sect. 34 of the Indian Patent Act XV. of 1859, inasmuch as no particulars of the breaches complained of had been delivered with the plaint; and that, in the absence of such particulars, he could not be called upon to state a defence to the action upon its merits.

The district judge, by an order dated the 2nd of March, 1882 (the day appointed for adjustment of issues), overruled both pleas, and adjusted issues for the trial of the cause. The first and second issues raised these two pleas; but the defendant, not being satisfied with the decision of the district judge, on the 7th of March, 1882, presented an application to the High Court under sect. 622 of the Civil Procedure Code, with the view of obtaining an alteration of the order of the 2nd of March, in so far as it related to these pleas. That petition was rejected, as irregular, by the High Court on the 20th of March, 1882; and the district judge then proceeded with the trial of the

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issues adjusted by him. On the same day on which the plaintiff's evidence was concluded, the defendant presented a petition in which he reiterated his pleas, and for the first time stated certain particulars of objections to the validity of the plaintiff's patents, which he desired to prove. The learned judge held that the notice of particulars came too late, and negatived the defendant's right to lead evidence in support of them; and thereafter he found, upon the plaintiff's evidence, that the alleged infringement had been established, and assessed damages at Rs.10,000. That sum was fixed, on the footing that it was a fair consideration for the defendant to pay for a license to use the plaintiff's inventions; but in the argument upon these appeals, the plaintiff's counsel admitted that the principle of assessment was erroneous, and that the damages due (if any) must be limited to the loss occasioned to the patentee by reason of the defendant's infringement.

Upon an appeal by the defendant, the High Court for the North-Western Provinces, consisting of Sir Robert Stuart, C.J., and Tyrrell, J., agreed with the Court below that the defendant's plea of no jurisdiction was not well founded. They held, however, contrary to the finding of the district judge, that there had been an entire failure on the part of the plaintiff to observe the requirements of sect. 34 of the Patent Act, and consequently "that the plaintiff came into Court without any case which could possibly be tried." Being of opinion, in these circumstances, that the plaintiff ought to be allowed another hearing on the merits, the learned judges directed "that the plaint be amended and presented in the proper Court, viz., the principal Court of original jurisdiction in civil cases at Cawnpore, and that with the plaint the particulars required by sect. 34 be duly delivered." The costs were ordered to "be reckoned as costs in the cause."

Their Lordships are of opinion that it is impossible, in any view which can be taken of the defendant's pleas, to sustain the operative decree of the High Court. It sets aside, or at least ignores, the whole previous proceedings, including the plaint in which the suit originated; and it directs a new and amended plaint to be presented to the Court, which is simply equivalent to directing a new suit to be instituted. Assuming that the

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defendant's pleas were rightly disposed of by the High Court, what the Court ought to have done was to give the plaintiff the alternative of having his suit dismissed, or of withdrawing it, with leave to bring a new action.

Their Lordships are of opinion that the defendant's plea, founded on sect. 34 of the Patent Act, was rightly disposed of by the district judge. It appears to them that the learned judges of the High Court have misconstrued the enactments of that section which refer to the particulars of breaches to be delivered by a plaintiff complaining of infringement. The sole object of these enactments is to give the defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information be given in the plaint itself, or in a separate paper. In so far as it relates to particulars of breaches, sect. 34 of the Indian Act is expressed in substantially the same terms with sect. 41 of the English Patent Act of 1852 (15 & 16 Vict. c. 83). In *Talbot* v. *La Roche* (1), which was an action for violation of a patent "for improvements in obtaining pictures or representations of objects," the plaintiff merely alleged that, during a certain period of time and at a certain place, the defendant had infringed, "by making, using, and selling pictures and portraits according to the plaintiff's invention;" and that was held, by the Court of Common Pleas, to be sufficient compliance with sect. 41. Chief Justice Jervis, distinguishing between particulars of breaches, and particulars of objection, to be delivered by the defendant, said in that case (2):—"Under a plea of want of novelty, the Court require the particulars to condescend upon the particular instances. But that is very different from this case, the matter there is not in the knowledge of the patentee. But the defendant must know whether and in what respects he has been guilty of infringement." In *Needham* v. *Oxley* (3) the plaintiff simply pointed to certain machines used by the defendant, and stated in general terms that they infringed his patent. Lord Hatherley held that sufficient particulars had been delivered, and he accordingly refused the defendant's motion for an order on the plaintiff to specify in what respects his machines infringed the patent. There are

(1) 15 C. B. 310.
(2) Page 321.
(3) 1 H. & M. 248.

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other authorities to the same effect, but it is unnecessary to refer to them.

In the present case all three of the plaintiff's patents relate to one article, a kiln for burning bricks, and the second and third in date are for improvements upon the invention specified in the first. The plaintiff points to a particular kiln constructed and used by the defendant, and in his plaint he not only refers to his patents, but indicates in the case of each of them the distinctive features of his invention which he alleges to have been appropriated by the defendant in the construction and use of the kiln. It is therefore impossible to accept the views of the High Court upon this branch of the case without disregarding the authoritative construction which has been put upon the corresponding section of the English Act, a construction which appears to their Lordships to be just and reasonable.

There only remains for consideration the objection stated by the defendant to the jurisdiction of the Court. The circumstances in which the plea was taken are these. The plaint was originally filed in the Court of the subordinate judge at Cawnpore on the 2nd of February, 1882, whereas sect. 22 of the Act XV. of 1859 provides that no action for infringement "shall be maintained in any Court other than the principal Court of original jurisdiction in civil cases within the local limits of whose jurisdiction the cause of action shall accrue, or the defendant shall reside as a fixed inhabitant." The principal Court of original jurisdiction was the Court of the district judge. On the 15th of February, 1882, the defendant personally signed, along with the plaintiff and his pleader, a petition praying the district judge to withdraw the case from the Court of the subordinate judge, and to try the suit in his own Court. On the same day an order was made in the District Court in these terms:—"That the case be transferred from the subordinate judge's Court to the file of the Court, and the date will be fixed hereafter." It is admitted that the district judge had no authority to issue that order unless such authority was given him by Act X. of 1877, sect. 25. The suit was entered in the file of the District Court, and has since proceeded as a transferred suit, originally instituted in the Court of the subordinate judge.

In the argument addressed to their Lordships it has not been disputed, and it does not appear to admit of doubt, that a suit for infringement could not be completely instituted in the Court of the subordinate judge. Sect. 22 of the Patent Act expressly provides that no such suit shall be maintained before that Court; and the first and an essential step in the maintenance of a suit is its due institution. In the opinion of their Lordships, the transference of the suit to the District Court was equally incompetent. It was decided by the High Court of Calcutta on the 10th of June, 1880 (1), that the Superior Court cannot make an order of transfer of a case under sect. 25 of the Civil Procedure Code, unless the Court from which the transfer is sought to be made has jurisdiction to try it. Having regard to the terms of sect. 25, their Lordships entirely approve of that decision. Apart, therefore, from any question of estoppel affecting the defendant, there was no competent suit depending at the plaintiff's instance on the 6th of April, 1882, when the defendant raised the plea of no jurisdiction in his written statement of defence.

But then it is said that the defendant must be held, by reason of his conduct in the suit, to have waived all objection to the irregularities of its institution before his statement of defence was lodged. It is not said that the defendant has done anything to waive that objection, since it was stated in his written answer to the plaint. On the contrary, he has taken every possible opportunity to insist in it. The result is, that the defendant must now have the same judgment upon his plea of no jurisdiction which ought to have been given by the district judge when the plea was first disposed of by him on the 2nd of March, 1882.

The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it, and that the order of transference was also incompetently made. The district judge was perfectly competent to entertain and try the suit, if it were competently brought, and their Lordships do not doubt that, in such a case, a defendant may be barred, by his own conduct, from objecting to irregularities in the institution of the suit. When the judge has no inherent

(1) *Peary Lall Mozoomdar* v. *Komal Kishore Dassia*, Ind. L. R. 6 Calc. 30.

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jurisdiction over the subject-matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. The present case does not come strictly within these authorities, because the defendant's plea was stated before issue was joined on the merits, and, in reliance on that plea, he objected to the case being tried, and withheld his objections to the validity of the patent. It is, therefore, necessary to consider the facts from which their Lordships are asked to infer that the defendant did, in point of fact, waive all objection to the competency of the suit, and engage that the cause should be tried on its merits by the district judge.

Great stress was laid by the plaintiff's counsel upon the terms of a petition prepared by the defendant's native pleader, which was filed before the district judge on the 24th of February, 1882. It is a singular fact that this petition, now said to be so very important, is one of the documents which neither of the parties considered of sufficient importance to be forwarded along with the other papers in these appeals. But taking the account given of it by the district judge, it must have been prepared by the defendant's pleader, before the transference of the suit on the 15th of April, with the view of informing the subordinate judge that the defendant was about to leave for England, in consequence of ill health, and moving that judge to have the cause heard and determined with the least possible delay. The petition states the plea of no jurisdiction in the subordinate judge, so that one of the points which the pleader, at the time when it was originally prepared, desired the subordinate judge to hear and determine at once was the plea against his own jurisdiction. Accordingly the plaintiff's argument as to waiver really rests upon the single fact that the defendant personally concurred with the plaintiff and his pleader in petitioning the district

judge to transfer the suit, in terms of sect. 25 of the Procedure Code. The grounds of that petition had nothing to do with want of jurisdiction in the Lower Court, but were ordinary grounds of convenience, which would justify the removal of a suit to the Higher Court from the Lower, assuming it to have been properly instituted there. Their Lordships are unable to hold that such a consent to a transfer operates as a waiver of the defendant's preliminary pleas or of any of his pleas. It is professedly and in substance nothing more than a consent that these pleas shall be disposed of by another than the subordinate judge. They are consequently of opinion that the district judge, instead of repelling, ought to have sustained the defendant's plea.

Their Lordships regret that, in accordance with the opinion which they have formed, the suit must be dismissed, on the ground that it was not competently brought; but they cannot dispense with the requirements of the Patent Act and Procedure Code, and the result is due to the plaintiff himself, who has shewn no less obstinacy than the defendant in perilling the issue of the case upon his own views of the law. Nothing would have been easier than for the plaintiff to obviate the objections to the regularity of the procedure urged by the defendant in his written statement. On the other hand, the defendant might, with perfect propriety and without difficulty, have stated his particulars of objections to the plaintiff's patent, notwithstanding the prejudicial pleas which he was maintaining. If the suit had been competently brought, their Lordships would certainly not have thought it right to indulge the defendant with a new trial of the cause, and would have given judgment for the plaintiff, with damages assessed upon a proper principle. As the case stands, they must humbly advise Her Majesty that the judgment of the High Court, except in so far as it recalls the decision of the district judge, must be reversed, and the suit dismissed, with costs in both Courts below. The executors of the defendant, Mr. Petman, will have their costs in the original and cross appeals.

Solicitors for appellants: *Barrow & Rogers.*
Solicitors for respondent: *Sanderson & Holland.*

J. C.* 1886 July 17.

VENKATA NARASIMHA APPA ROW . . APPELLANT;

AND

THE COURT OF WARDS AND OTHERS . . RESPONDENTS.

VENKATA RAMALAKSHMI GARU AND OTHERS . . . . . } APPELLANTS;

AND

GOPALA APPA ROW AND OTHERS . . . RESPONDENTS.

Ex parte RAJAH GOPALA APPA ROW.

ON APPEAL FROM THE HIGH COURT AT MADRAS.

Practice—Petition for Rehearing.

In a petition for rehearing of two appeals which had been fully heard upon their merits, and in which judgment had been given and reported to Her Majesty, and confirmed by regular orders in Council:—

Held, that assuming that a relevant case of new matter had been made out the decision was final, and the petition must be refused.

There may be exceptional circumstances which will warrant this Board, even after an order of Her Majesty in Council has been made, in allowing a rehearing at the instance of one of the parties; but this is an indulgence with a view mainly to doing justice when by some accident, without blame, the party has not been heard and an order has been made inadvertently as if the party had been heard.

Rajunder Narain Rae v. *Bajai Govind Sing* (1) referred to.

THIS was a petition of Rajah Raji Gopala Appa Row for an order that two appeals should be reheard, and that two orders of Her Majesty in Council dated the 15th of December, 1879, and the 3rd of May, 1882, should be varied, and the judgment of the High Court of Madras therein restored.

The judgment of the Judicial Committee in the earlier appeal was given on the 13th of December, 1879, and is reported in Law Rep. 7 Ind. Ap. 38.

The later judgment was in an action commenced shortly after

* *Present*:—LORD WATSON, LORD HOBHOUSE, SIR BARNES PEACOCK, and SIR RICHARD COUCH.

(1) 2 Moore's Ind. Ap. Ca. 220; S. C. 1 Moore's P. C. 117.

the former one by three brothers of the former plaintiff, also against the eldest brother, claiming their shares in consequence of the partibility of the estate. It appearing that the evidence was the same as in the former case, the judgment and order followed accordingly.

The petitioner alleged that having been an infant at the hearing of the appeal, which was decided on the 13th of December, 1879, he had since attained full age and had discovered that there were documents existing among the public records in India which shew that the said zemindary was never escheated or declared forfeited, but was only held by the Government till certain taxes should have been reimbursed out of its revenues, and that previous to the sunnud of the 8th of December, 1802, being executed the zemindary had been ordered to be restored to the family, and the arrears of taxes forgiven, and a release given to each of the said brothers, to whom parts of the zemindary were granted. The petitioner specified the documents from which he alleged that the foregoing appeared.

Bompas, Q.C. (*Nandalall Ghose* with him) for the petitioner, contended that it had been decided by the Privy Council that where a zemindary had been previously restored the granting of a sunnud in the terms of that granted in this case does not affect the rule of descent, or render the zemindary partible. The judgment in 7 Ind. Ap. not only affected the immediate rights of the parties, but must inevitably lead to the complete breaking up of the zemindary. The property was of great value, and the decision affected many people besides the parties. Reference was made to the Civil Procedure Code, 1882, sect. 623, which prescribed the course to be taken and the rights of the parties on the discovery of new and important matter or evidence after judgment, not discoverable by due diligence previously. By Act XV. of 1877, sect. 7, an infant is entitled as of right to make the application for review contemplated by the last quoted Act within three years after he comes of age, whatever the date of the decree. See *Kelsall* v. *Kelsall* (1); *Dabee Dutt Shahoo* v. *Subodra Bibee* (2). The Privy Council has the power to review its own judgments. See *Hebbert*

(1) 2 M. & K. 409.

(2) 25 Suth. W. R. 449.

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v. *Purchas* (1); and *The Singapore and The Hebe* (2); and the cases and statutes cited in the former case. Reference was also made to *Rajah Deadar Hossein* v. *Ranee Zuhoorunissa* (3); *The Shivagunga Case, Mutta Vaduganadha Tevar* v. *Dora Singa Tevar* (4); *Meer Mahommed Hossein* v. *Forbes* (5); *Muttusawmy Yettappa* v. *Vencataswara* (6); *Juveer Bhaee* v. *Vuruj Bhaee* (7).

The judgment of their Lordships was delivered by

LORD WATSON:—

Their Lordships are of opinion that this petition must be refused.

The petitioner asks a rehearing of the judgment of this Board in these two appeals, which was finally approved by Her Majesty in Council in the year 1883. The ground upon which he makes the application is, that he has discovered certain new matter which would, if it had been produced in these appeals, have materially affected the judgment of the Board. After hearing a very full explanation from counsel at the Bar, it appears to their Lordships to be exceedingly doubtful whether the documentary evidence, which is said to be new, could have had any bearing or any effect upon the decision of the Board. But it is hardly necessary to consider that point, because some of the documents which are alleged to be new are printed at length in the record formerly before this Board; and that which is now represented by the petitioner to be the most important of them all is a recommendation of the Special Commissioner, approved of by the Governor in Council on the 3rd of December, 1802. That document is fully and correctly described in the record, so that its existence was known to the parties. In short it is certain that most of the documents were well known to the parties, and were actually produced, and that, with reasonable care and diligence, all of them might have been recovered and made evidence, by the ordinary methods of procedure.

(1) Law Rep. 3 P. C. 664.
(2) Law Rep. 1 P. C. 378.
(3) Macph. P. C. 165.
(4) Law Rep. 8 Ind. Ap. 99.
(5) Law Rep. 2 Ind. Ap. 1.
(6) 12 Moore's Ind. App. Ca. 203.
(7) 3 Moore's Ind. App. Ca. 324.

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Their Lordships are unwilling to dispose of this application on these grounds alone. They are willing to assume, for the purposes of this petition, that a relevant case of res noviter is set forth in it,—new matter which would, if it had been submitted to the consideration of this Board, possibly have led to a different decision from that which was formerly arrived at. But in considering the petitioner's motion for a rehearing, the following facts must be kept in view. It is not alleged that there was any informality in the conduct of these suits from their inception to their close. Both parties appeared before the Committee; they were fully heard upon the merits of the appeals, the petitioner being at that time represented by the Court of Wards. It is not said that there was any error in framing the judgment of this Board, or that it did not fully and accurately express what the Board intended to decide. Then it was reported to Her Majesty, and was confirmed by regular Orders in Council dated the 3rd of May, 1882, and the 19th of July, 1883. No authority has been cited to their Lordships which can warrant them in granting a rehearing under such circumstances as these. It is quite true that there may be exceptional circumstances which will warrant this Board, even after their advice has been acted upon by Her Majesty in Council, in allowing a case to be re-heard at the instance of one of the parties. The cases in which that may be competently done are explained by Lord Brougham in the case of *Rajunder Narain Rae* v. *Bijai Govind Sing* (1). His Lordship properly describes this privilege, when allowed, not as a right, but as an indulgence. At page 134 of the first volume of Moore's Reports, his Lordship says: "It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where, by some accident, without any blame, the party has not been heard, and an order has been inadvertently made as if the party had been heard." Even before report, whilst the decision of the Board is not yet res judicata great caution has been observed in permitting the rehearing of appeals. In the last case to which we were referred, that of

(1) 2 Moore's Ind. Ap. Ca. 181; S. C. 1 Moo. P. C. 117

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Hebbert v. *Purchas* (1), where a litigant alleged, before report and approval, that he had been disabled by want of means from appearing and maintaining his case, the Lord Chancellor said:—"Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finalty of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused." There is a salutary maxim which ought to be observed by all Courts of last resort—Interest reipublicæ ut sit finis litium. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

Solicitors for Petitioner: *Scott & Spalding.*

(1) Law Rep. 3 P. C. 664.

[HOUSE OF LORDS.]

MAGISTRATES OF EDINBURGH . . . APPELLANTS; H. L. (Sc.)
1886
AND *Feb.* 18.
BLACKIE AND OTHERS . . . . . RESPONDENTS.

Edinburgh Market (37 & 38 *Vict. c. lxxxv. s.* 8)—*Power of Corporation to let covered Portion of Market for other Purposes.*

By 37 & 38 Vict. c. lxxxv. s. 8, the corporation of Edinburgh (who were grantees of a market in Edinburgh) "may cover in a suitable and convenient manner the fruit and vegetable market place, and improve and better adapt the same for the purposes of such market, and for the accommodation of parties using the same, and of the public, &c. Provided always that the ground floor only of such market place shall be used for such fruit and vegetable market, and that all vacant portions of such market place, whether on the ground floor or above the same, and all vacant and unlet stands, stalls, or shops in or on such market place may be let or used by the corporation for such purposes and for such rents or sales as to them shall seem proper:—

Held, affirming the decision of the Court below, that the corporation were not entitled to exclude members of the public from the covered portion of the market during market hours and devote the building to other purposes.

Per LORD WATSON:—When a grant of market is not confined to any particular locality, the grantee may, from time to time change the site in order to suit his own convenience; but it is an implied condition of the exclusive privilege that he shall provide a market place, and that implied condition is satisfied so long as he gives reasonable accommodation to those members of the public who use the market either as buyers or sellers, and the extent of the accommodation which must be afforded in each case must vary with the circumstances.

APPEAL from the First Division of the Court of Session, Scotland.

The question raised by this appeal was whether the corporation of Edinburgh, the grantees from the Crown and the Scottish Parliaments of the right of holding markets and fairs within the burgh, can in virtue of their powers of administration and control deprive the market gardeners of the use of a building wherein a fruit and vegetable market is held for a limited time.

The corporation of Edinburgh were the appellants; and the respondents were certain market gardeners and wholesale fruit and vegetable merchants who regularly used the market.

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Prior to 1821 it appears the market for fruit and vegetables was held in the High Street of Edinburgh. In that year a change was made, and a market for fruit and vegetables was opened near the North Bridge.

In 1840 an Act (3 & 4 Vict. c. 17) was passed with reference to the City Petty Market Customs, and sect. 21 provided that it may be lawful to the magistrates to fix and ascertain the boundaries and limits of the existing market places, as they shall find the same to be necessary; to alter the time of holding the different markets; to divide and allocate the stands; to alter and enlarge the markets and market places; and altogether to change the situation of any existing markets or market places, and to substitute other markets or market places in their stead. And sect. 22 gave them power to make bye-laws for the regulation of the different markets. Under the schedule to this Act 2*d.* per day was to be paid for each stand in the fruit and vegetable markets.

In 1860 the North British Railway obtained parliamentary powers to acquire the site of the fruit and vegetable market, which had by this time been enclosed with walls. But it was provided that the company must not interfere with the lands on which the fruit and vegetable market was held, or any of the accesses thereto, until it shall have been determined between the company and the corporation on what other site another market should be constructed at the company's expense; and until the new market should be ready for use. It was provided in another section this should be settled by arbitration in lieu of agreement. Litigation having ensued with respect to the arbiter's decree, an Act was passed in 1865 to give effect to an agreement between the corporation and the railway company with reference to this market. By this Act (28 & 29 Vict. c. 152) it was enacted that the company should take a portion of the market, but they were to enclose the part, inter alia, described as the vegetable market, and also another piece of ground, and "shall causeway and lay out the area so enclosed, and fit up the same in a completed form for the purposes of a fruit and vegetable market."

By an Act in the following year, 1866, the company obtained power to acquire the whole site of the market, and to construct

"a new fruit and vegetable market, on ground adjoining Princes Street and Waverley Bridge." This market was constructed and handed over to the corporation in 1869; the market gardeners agreeing to pay 6*d.* a stand, which was three times as much as they paid before. The market was uncovered; and the Edinburgh Markets and Customs Act of 1874 empowered the corporation to cover it, and to provide means for the necessary expenses.

The 8th section of the Act provides:—

> The corporation may cover in a suitable and convenient manner the fruit and vegetable market place, and improve and better adapt the same for the purposes of such market, and for the accommodation of parties using the same, and of the public; and may make such internal and other arrangements and divisions in regard to stands, stalls, and shops as to them may seem suitable: Provided always that the ground floor only of such market place shall be used for such fruit and vegetable market, and that all vacant portions of such market place, whether on the ground floor, or above the same, and all vacant and unlet stands, stalls, or shops in or on such market place, may be let or used by the corporation for such purposes and for such rents or rates as to them shall seem proper.

Sect. 26 provides that—

> Nothing in this Act contained shall be held to affect the right and power of the corporation to fix, alter, and regulate markets and market places, and establish additional markets, conferred or confirmed by the second recited Act (the Act of 1840), or by any other of the recited Acts, whether within or beyond the limits of the city.

To provide for the expenditure, power was given to borrow £25,000, which was to be paid off by a sinking fund in twenty years. The rate of 6*d.* a cart which had been paid by the gardeners using the market for each time they came there was raised to 1*s.*; and a poll-tax on the public entering was also imposed. These rates form No. 1 in the schedule A of the Act, and are headed:—"Table of Rates to be levied in the Fruit and Vegetable Market and Market Place or in connection therewith." Other sources of income included the permanent letting of the market for other than market purposes.

In virtue of these statutory powers, the corporation made on the 16th of October, 1877, certain bye-laws which were confirmed by the sheriff.

The first rule provided: "The market place shall comprehend

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the area of the market house, and the ground belonging thereto, &c., and the public roads, streets, &c., situate within a radius of one hundred yards measured from any part of the said market house."

The principal market days were Tuesdays, Thursdays, and Saturdays. The market opened at a very early hour and closed at 10 a.m., and the public largely resorted to the market.

In April, 1882, the appellants, the corporation, gave up the whole area of the market house to be used exclusively for the Fisheries Exhibition, and caused the market to be held in the adjoining streets for three weeks. The respondents as market gardeners, &c., and as representing the public, inter alia, raised the present action for declarator that the market place is vested in and held by the appellants primarily for the purposes of the market, and that the respondents have a right to the peaceful use and enjoyment of it for market purposes: and that the appellants should be interdicted from excluding the respondents from the use of the market place in time to come.

A proof was adduced from which it appeared, inter alia, that there were 158 stands, and that about 100 carts is about the usual number on a Saturday. When more came than could be accommodated, they had to stand outside, and this had been the case when a flower show was held on Thursdays. That while the primary use of the market house was for a fruit and vegetable market, parts of it had been let for other purposes, namely, a portion of the ground floor for an aquarium and refreshment rooms, and certain parts of it both on the ground floor and galleries for shops. It had been let occasionally for various exhibitions, but none of these, except the flower shows on Thursday, required the market to be held outside.

On the 20th of February, 1883, the Lord Ordinary (1) held that the corporation had appropriated the market place for the use of the market; but were not barred from giving the occasional exclusive use of it for other purposes of public interest and utility.

On the 5th of February, 1884, the First Division (Lord Deas

(1) Lord Fraser.

dissenting) recalled the Lord Ordinary's interlocutor and pronounced the following :—

Find first, that having regard (1) To the construction and enclosure, in or about the year 1822, of the public fruit and vegetable market of the city on the ground situated under and to the west of the North Bridge of Edinburgh, and to the occupation and use thereof for market purposes from that time till the year 1869 or thereby; (2) To the provisions of the North British Railway (New Works) Act, 1866, and of the agreement of November, 1865, between the defenders' predecessors and the North British Railway Company, thereby confirmed, and also to the provisions of the Edinburgh Markets and Customs Act, 1874, and particularly s. 8 thereof; and (3) To what has followed on these statutes, and particularly to the removal, in virtue of the said first-mentioned statute and agreement, in or about the year 1869, of the fruit and vegetable market, from the enclosed ground before mentioned to the present site thereof, and to the enclosure of the same at the time, and to the subsequent covering in of the market place in or after the year 1874, in virtue of the provisions of the statute of that year, and to the payment of the increased dues thereby authorized to be levied, and which have been in use to be levied since that time from the pursuers, and other members of the public resorting to the said market, as the public fruit and vegetable market of the city, the said present covered fruit and vegetable market place or house situated on the south side of Princes Street, and in the parish of St. Andrew's, Edinburgh, is vested in and held by the defenders primarily for the purposes of the public fruit and vegetable market of the city, to which the pursuers and other members of the public have right to resort on the usual market days, and at the usual market hours, for the transaction of business, on payment of the proper and usual dues or charges,—subject always to the provision of s. 8 of the said statute of 1874, to the effect that all vacant portions of the said covered market place, whether on the ground floor or above the same, and all vacant and unlet stands, stalls, or shops in or on the market place, may be let or used by the defenders for such purposes, and for such rents or rates as to them shall seem proper: Find secondly, that it is within the power and discretion of the defenders to allow the said covered-in market place or house, including the ground floor thereof, to be used for purposes of public interest or utility at such times as the same is not required for the purposes of said market, and even to allow of such use on market days and during the ordinary market hours on special occasions, for such length of time as may not cause material and serious inconvenience to the pursuers and other persons frequenting the same, the defenders always providing on such occasions temporary accommodation suitable to the circumstances, as a substitute for the said covered market place or house; but find thirdly, that it is beyond the powers and discretion of the defenders to exclude the pursuers and other members of the public from the use of the said market place or house for so long a period as three weeks continuously, assigning only unenclosed ground on part of the public streets in the neighbourhood of the said covered-in market place or house, as the site or place for holding the ordinary public fruit and vegetable market for that time: to that extent and effect, find and declare in terms of the conclusions of the summons (1).

(1) 11 Court Sess. Cas. 4th Series, 783.

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The appellants appealed, but there was no cross-appeal against this interlocutor.

Feb. 12, 15, 16. *The Lord Advocate* (*Balfour*, Q.C.) and *The Solicitor General for Scotland* (*Asher*, Q.C.), for the appellants:—

To allow this interlocutor to stand would curtail the rights of the corporation to a considerable extent. They had a discretion under the common law and royal charters to remove the site of the market from place to place so long as it was within the boundary of the franchise; so long, therefore, as they gave reasonable market accommodation, they could not be said to be exceeding their powers. When a new market is substituted for an old market, the presumption is that those having right to the franchise, regulation, alteration, and administration, have the same powers over the substituted market. Per Lord Westbury, L.C., in *Clephane* v. *Magistrates of Edinburgh* (1). All the judges in the Court below were of opinion that there was no right in the respondents to object to being excluded for a certain time, so long as that was not too long—and as there was no appeal against that finding, it must be taken as the respondents' case—but the majority of the Court go on to hold that, if the exclusion extends to nine market days, it is excessive. But if there was a discretion at all in the matter, the corporation, who are responsible to the community, had the best means of judging what was most beneficial, and a Court of law ought to be slow to override their decision in a matter such as the regulation of markets and the use of a market house and the adjoining area of the market.

H. Davey, S.G., *J. P. B. Robertson*, Q.C., and *MacClymont*, for the respondents, were not called upon.

The following judgments were delivered:—

LORD HERSCHELL, L.C.:—

This is an action brought by a number of pursuers who have been in the habit of frequenting the fruit and vegetable market in the city of Edinburgh. It is in the nature of an actio popularis, brought by the pursuers in respect of the fruit and vegetable market, to obtain a declaration that the corporation of Edinburgh

(1) 2 Court Sess. Cas. 3rd Series (H. L.), at p. 14.

have acted beyond their power in excluding them during a certain period from the use of that market.

Some question appears to have been raised, which had weight in the mind of one of the learned judges of the Court below, as to the competency of such an action as this; but the matter was not seriously contested at your Lordships' bar, and I think it is clear that the decision of this House in the case of the *Duke of Atholl* v. *Torrie* (1) completely covers a case such as this, and establishes that it is competent to those who have been in the use of a right common to the public to bring an action, when that right is interfered with, in order to obtain a declaration establishing the right for which they contend. Therefore, if the allegations in the summons are made out, I think there can be no question that an action will lie; and your Lordships have, therefore, to consider whether the allegations in the summons in this case have been established or not.

Now it appears that from an early period the corporation of Edinburgh have enjoyed the franchise of a market for the sale of various commodities, amongst others, fruit and vegetables; and it may not be unimportant to observe that the franchise has an operation beyond the limits of the city of Edinburgh, and that, although the market is a market held within the city, yet the possession of that franchise by the corporation entitles them to restrain acts from being done, in the way of interference with that market, beyond the limits of the city. It appears that for many years, indeed down to a comparatively recent period, the market has been held in the public streets of the city, different parts—first of the High Street, and then of other streets of the city, having been allocated to the purposes of the market; and until about the year 1821 there was no enclosed market place in which this fruit and vegetable market was held; but in or about that year, or shortly afterwards, an enclosed market place was created, in which the market was, as far as one can judge, ordinarily held. But that was not the limit within which the market could lawfully be held, because I think it is clear that the market might lawfully be held in certain streets in the neighbourhood of the enclosed market place.

(1) 1 Macq. 65.

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So matters remained, without any statutory regulation of the market, down to 1840, and in that year an Act was passed for the abolition of petty customs, which for the first time limited and regulated the charges which might be made by the corporation for the use of the market place by those who frequented it. I do not think it necessary at the moment to say anything further about that Act. I shall have to revert to it when I consider the effect of the subsequent legislation.

This state of things continued until the year 1860; and between the years 1860 and 1866 various statutes were passed and agreements made having reference to the taking by the North British Railway Company, for the purposes of their railway, of certain portions of the market area. In the view which I take it is not necessary to go in detail into the effect of those statutes or agreements beyond stating generally that the railway company, in respect of their taking a portion of the market area for the purposes of their railway, and so depriving the city of it, were bound to substitute in the place of what they took a market area, and to construct, so far, at all events, as the previous market area had been a matter of construction, a building in substitution of that which they took.

Some reliance has been placed upon the Acts which were passed, under which the fruit and vegetable market was constructed which was in use at the time of the passing of the Act of 1874; but, my Lords, I think that there is much force in the contention on the part of the appellants that those Acts did not in any way affect the rights of the corporation with regard to the mode in which it was competent to them to deal with the market-place so constructed by the North British Railway Company—that they merely substituted the market place so constructed for the market place taken, and that whatever rights existed with regard to the market place taken, remained with regard to the market place substituted in its stead. My Lords, I am content, for the purposes of this argument, to concede that this was so, for I prefer to base my judgment exclusively upon the statute of 1874, and what I apprehend to be the true construction of that statute.

Now, my Lords, it is necessary to see what was the state of things existing at the time when that statute passed. There did,

in point of fact exist an enclosed area, which I have no doubt was known as the Fruit and Vegetable Market, and the charges which might be lawfully made by the corporation in respect of that enclosed area were limited and regulated by statute. I quite agree with the argument urged before us that it was competent to the corporation to allocate such parts of the market area as they thought fit to the purposes of the different markets, the franchise of which they enjoyed. At that time the whole of the area was uncovered, and I think it was competent for the corporation to determine in what part of that which formed the market area a particular market was to be held. But we now come to the statute of 1874, and it is necessary to examine the language of that statute in order to see whether it did not change the position of affairs and create in the corporation duties or obligations with respect to the market place which had not existed down to that date.

The preamble of that statute recites that "the corporation of Edinburgh possess a fruit and vegetable market place, situated in the parish of St. Andrews, and city and royal burgh of Edinburgh;" and the first question which I think it is necessary to consider is, what is the meaning to be attached to the words "market place" when found in this statute. Now, my Lords, when the whole of the statute is looked at, I can entertain no doubt that by the words "market place" in this statute is meant that enclosed space to which I have already referred, and not the entire market area within the ambit of which it was lawful to hold the market, even although in a certain sense it might properly be termed the market place—because, my Lords, the 8th section, which is the most important section in the statute for your Lordships' consideration, empowers the corporation "in a suitable and convenient manner to cover in the fruit and vegetable market place." Now, is it seriously open to question that the market place there referred to is this inclosed area, and can it seriously be contended that power either was given to the corporation, or was intended to be given to them, by that section to cover over not merely that enclosed space, but the whole of the surrounding streets within the area of which this market might lawfully be held? I think that this is made still clearer when

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the language of schedule A is examined, because the very first provision is a charge "for each stall on the ground level of the market place." Now, I think there can be no doubt that the ground level there referred to is the same thing as the ground floor spoken of in sect. 8. The very use of the term "ground level" implies something existing above that level, and, I think, points to the ground level of the area which was so covered over. Then, later on a poll-tax is for the first time created "from every person entering the market place on any day, and for each time he shall so enter." There, again, I think it would be difficult to contend that the term "market place" is used in any sense other than that which I have suggested.

My Lords, if that be so, we find this state of things, that by sect. 8 power is given to the corporation "in a suitable and convenient manner to cover in the fruit and vegetable market place, and improve and better adapt the same for the purposes of such market;" and we find in conjunction with the power which was given so to improve and better adapt that area for the purposes of a market by covering it in, power to make a higher charge than had down to that time been lawful for the use of that market place, and power for the first time to make a charge on all persons entering it, even although they entered it for the purpose of purchase, and not of sale. I cannot but think that those circumstances throw light upon the construction to be put upon sect. 8; and when the language of sect 8 is further considered, and it is found to contain a proviso "that the ground floor only of such market place shall be used for such fruit and vegetable market, and that all vacant portions of such market place, whether on the ground floor or above the same, and all vacant and unlet stands, stalls, or shops, in or on such market place may be let or used by the corporation for such purposes and for such rents or rates as to them shall seem proper," I can put but this construction upon the section, that it was intended to point to a distinction between a portion of that covered area, that portion namely on the ground floor which was required for the purposes of a market place during market hours, and the rest of the area, and that area itself in other than market hours; and that whilst with regard to the rest of the market area, and to all the vacant portions of that area, that is to

say, portions not required for the purposes of the market, there is the amplest power given to let them at such rates and on such terms as the corporation shall think fit, yet the intention and purpose of the enactment was to subordinate, as regards so much of the ground floor as was required for the fruit and vegetable market, all other purposes to the purpose of the fruit and vegetable market. According to the contention put before us on the part of the appellants it was open to the corporation, after this enactment passed, to allocate the sellers of fruit and vegetables to any part of the market area just as it was before. The argument of the Solicitor General for Scotland went that length. I think that that view was perfectly logical, because I myself see great difficulty in any construction of the section which shall meet the views of the appellants, and yet fall short of that contention; but I think that when the terms of the enactment and the circumstance of this additional tax are taken into consideration, it is impossible to come to the conclusion that the corporation were intended to have the power of allocating to any part of the market area those who sold fruit and vegetables, excluding them from this market place in respect of which higher charges were from time to time to be made upon them, and in respect of which a poll-tax was created which all persons entering the market place were liable to pay.

My Lords, no doubt under this section large powers of discretion are reposed in the corporation. As regards all parts of this building which are not on the ground floor, and the vacant parts on the ground floor, by which I understand the parts not used or needed for the purpose of the fruit and vegetable market, the discretion of the corporation as to their use is absolute. So far as regards even the market space, except in market hours, and as so far as the market is not interfered with, I think the discretion of the corporation again is absolute. But when we come to consider that portion of the market area which is required for the market during market hours, I do not think that the corporation have had a discretion subsequent to this statute to divert that part of the building during market hours to uses other than market uses, however beneficial they may consider these other uses to be in the interests of the public.

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My Lords, it appears to me, therefore, that subsequently to the passing of that statute the public had rights differing from the rights which existed before, just in the same way as they were subject in the use of the market to burdens to which they were not subject before. Their obligation to go to this market remained. No more after this statute than before could they have set up a market elsewhere; and, as I have said, that obligation rested, to some extent at all events, upon those who were beyond the limits of the city. Just as an additional obligation was imposed upon the public in respect of the use of the market, so I think there was an additional duty imposed upon the corporation: and the market area so covered in could no longer, even if it were possible before, be used at the absolute discretion of the corporation to the exclusion of those who desired to use the fruit and vegetable market.

My Lords, it was contended that the construction of s. 8 was to be in some respects limited by the provisions of s. 26, which provides that "nothing in this Act contained shall be held to affect the right and power of the corporation to fix, alter, and regulate markets and market places, and establish additional markets, conferred or confirmed by the second recited Act, or by any other of the recited Acts, whether within or beyond the limits of the city." Now, my Lords, that section refers mainly to the second recited Act, that being the Act of 1840, to which I have already made reference. By the 21st section of that earlier Act, it is provided "that it shall and may be lawful to the corporation, and they are hereby authorized and empowered to fix and ascertain the boundaries and limits of the existing market places as they shall find the same to be necessary; to alter the days and hours of holding the different markets; to divide and allocate the stands in the same, to alter and enlarge the markets and market places, and altogether to change the situation of any of the existing markets or market places, and to substitute other markets or market places in their stead; and to establish additional markets;" and, then, by the 22nd section, power is given to make rules, regulations, orders and bye-laws for the better regulation and government of the different markets. This appears to me to be the power conferred; and the only power

confirmed, so far as I can see, is that referred to in the 26th section, which provides "that it shall not be lawful for any other parties than the corporation to establish any cattle market for the sale of cattle, horses, sheep, or other live stock, or any wholesale corn market for the sale of oats, meal, barley, pease, beans, or other grain within the bounds of police of the city of Edinburgh for the time being: Provided always that such rights of market as the said corporation enjoy within or beyond these limits shall not be injured or limited by anything contained in this Act." That confirmation of their previous powers no doubt is kept alive by the terms of s. 26; but, my Lords, giving full effect to s. 26, and conceding that all the powers (although a question was raised as to some of them in the course of the argument) which are defined in s. 21 or the following sections of that Act, are kept in full force by s. 26, that does not appear to me in any way to affect or control the construction,—as I think, the plain construction,—of s. 8 to which I have already pointed your Lordships' attention.

Well, my Lords, putting the construction upon the statute which I have expressed to your Lordships, it follows that in my view the respondents in this case were entitled to maintain this action of declarator, and that they were entitled to the interdict which they prayed for. Some difficulty, my Lords, no doubt is created by the language used in the interlocutor. In the Court below the learned Lords prefaced the final declaration of the interlocutor by certain considerations which perhaps are not strictly a part of the determination of the case, but are rather considerations or views which have led to that determination. Amongst those is the second in these terms: "That it is within the power and discretion of the defenders to allow the said covered-in market place or house, including the ground-floor thereof, to be used for purposes of public interest or utility at such times as the same is not required for the purposes of said market." So far I do not think that any reasonable objection can be taken to the language used; but then it proceeds thus: "and even to allow of such use on market days and during the ordinary market hours on special occasions, for such length of time as may not cause material and serious inconvenience to the

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pursuers and other persons frequenting the same, the defenders always providing on such occasions temporary accommodation suitable to the circumstances, as a substitute for the said covered market place or house." Now, my Lords, the appellants have contended that inasmuch as that allows in the corporation a certain discretion to exclude from the use of this market house during market hours, it follows that the matter is one entirely of discretion, and that there was no abuse of discretion in the exclusion for the period complained of in this case, namely, from the 7th to the 30th of April, a period including nine market days, of which six were important market days and three unimportant. No objection appears to have been taken on the part of the respondents, the pursuers in the action, to the limitation upon the rights of the public, or declaration of the rights of the corporation, contained in that finding, and there is no cross appeal in respect of it; though it has become necessary for the purposes of the decision of this case, in the view which your Lordships have taken, to express an opinion upon the construction of the section which no doubt may be said to be somewhat at variance with the finding or the language which I have just read. But it does not appear, I believe, to any of your Lordships to be necessary (and it may be doubtful whether there is the power inasmuch as there is no cross appeal) to make any alteration in the terms of the interlocutor, inasmuch as the final declaratory part of the interlocutor is in these terms, with which I think all your Lordships agree: "That it is beyond the powers and discretion of the defenders to exclude the pursuers and other members of the public from the use of the said market place or house for so long a period as three weeks continuously, assigning only unenclosed ground on part of the public streets in the neighbourhood of the said covered-in market place or house as the site or place for holding the ordinary public fruit and vegetable market for that time: To that extent and effect, find and declare in terms of the conclusions of the summons." Therefore, when we come to the actual finding and declaration it appears to be in terms to which no exception can be taken; and, certainly, having regard to the mode in which this case has come before your Lordships with no appeal on the part of the pursuers against

that portion of the interlocutor to which I have called attention, I do not think it would be possible to contend that the rights of the public could be in any way affected or bound, as by res judicata, by the determination of your Lordships if you simply affirm the interlocutor of the Court below.

My Lords, upon the whole, I come to the conclusion that the judgment of the Court below is substantially correct, and I move your Lordships that the interlocutors be affirmed, and the appeal dismissed with costs.

LORD WATSON:—

I see no reason to doubt that, when a grant of market is not confined to any particular locality, the grantee may, from time to time, change the site upon which it is held in order to suit his own convenience. It is an implied condition of the exclusive privilege conferred upon him, that he shall provide a market place, but that condition is satisfied so long as he gives reasonable accommodation to those members of the public who use the market either as buyers or sellers. The character and extent of the accommodation which must be afforded to the public who resort to the market, will obviously vary with the circumstances of each case.

The obligation of the appellants, as in a question with the respondents, would probably have been no greater than I have already indicated if the appellant's privilege of market had rested solely upon their charters from the Kings of Scotland, and relative statutes of the Scottish Parliament; but that does not appear to me to be the real condition of the argument in the present case. In point of fact the appellants were not satisfied with the rights they enjoyed under these charters and statutes; and they have applied for and obtained from the legislature certain statutory powers as against all persons resorting to their fruit and vegetable market, which appear to me, by plain implication, to enlarge the rights which these persons previously had to accommodation within the market place. After the statement of the facts of the case which has been made by the Lord Chancellor, I do not think it necessary to go further back than the most recent Act (37 & 38 Vict. c. 85), which, though a local and

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personal, is, at the same time, a public statute; or to enter into the history of the market place and its various changes of site, whether made by the appellants voluntarily or under statutory compulsion, before the passing of that Act, in the year 1874. At that time the market place for fruit and vegetables consisted of a rectangular area, enclosed by stone walls, bounded by Princes Street on the north and by the station of the North British Railway Company on the south; and I assume that the market place, as then fixed and defined by the appellants, also included the public streets of the city within a radius of 100 yards, measuring from any part of the enclosed area.

An argument was addressed to your Lordships by the appellants' counsel, with the view of shewing that, notwithstanding the provisions of the Act of 1874, the appellants still possess the same powers which they had under their original charters to fix, alter, or change altogether the site of the market place. In my opinion, the decision of that point one way or another cannot affect the present case. There is no proposal before us for altering the market place or transferring it to a new site. The only right asserted by the appellants is a discretionary power to regulate the use of an existing market place during market hours, to the effect of occasionally excluding the marketing public from the area which has been covered in since the year 1874.

The Act of 1874, which embraces a great variety of matters, proceeds inter alia, on the recital that the appellants possessed a fruit and vegetable market place, that it was expedient that they should have power to cover in "the said market place," and to improve and better adapt the same for public use, and for the accommodation of parties using the same—and also that the dues, &c., leviable in respect of the existing market, should be amended. The 8th section accordingly, gives the appellants power to cover in "the fruit and vegetable market place;" and the 17th section empowers them to levy, in connection with the market the increased rates specified in Sched. A. Throughout the Act the expression "fruit and vegetable market place" is used to denote the area now covered in, which is admittedly the same with the area previously enclosed by walls, and does not include any part of the public streets. The increased rates specified in Sched. A.

as the Lord Chancellor has already pointed out, have reference exclusively to the use of that area, or to the buildings erected upon or in connection with it.

It seems clear that the improvement of the market place, authorized by the Act, was designed to effect two distinct objects, the one being the accommodation of the general public, and the other the accommodation of those members of the public who are in use to sell in the market. It is in my opinion equally clear that the purpose of the legislature in sanctioning an increase of the rates payable by the latter class of persons, was to make them contribute their quota towards the cost of providing such improved market and other accommodation. The appellants could not have raised the rates without the authority of the legislature; and in these circumstances it appears to me to be matter of reasonable implication that the statutory power of rating now vested in the appellants, involves a corresponding right on the part of the respondents, to have, and enjoy, during market hours, the benefit of the improvements made, in terms of the Act, upon the fruit and vegetable market place. It might no doubt have appeared that such was not the intention of the legislature, but I can find nothing in the provisions of the Act to warrant that inference. On the contrary, as I read the enactments of s. 8, they in effect provide that the "ground floor" of what has been styled the "market house" in the course of the argument, is to be devoted to the uses of a fruit and vegetable market to such extent, and so long as required for that purpose, during regular market hours; and that, during these hours, no part of the ground floor which is required for market purposes, is to be otherwise used. That being so, I do not think it is within the power or discretion of the appellants to exclude the respondents and other frequenters of the market from the ground floor of the market house, and in lieu thereof to assign to them part of the surrounding streets.

I therefore agree with the majority of the Judges of the First Division in thinking that the exclusion of the respondents from the covered area, during market hours, for three successive weeks constituted a substantial infringement of their right. I do not for a moment doubt that the appellants acted in the honest belief that they had power to exclude the respondents and were

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influenced by a laudable desire to stimulate and improve one of our great national industries. But the importance of the object they had in view, is of no relevancy in the present question. The Act of 1874 has, in my opinion, provided that the primary use of the ground floor shall be for the purposes of a fruit and vegetable market; and no interference with that primary use can be justified on ground of expediency.

These being the views which I entertain in regard to the merits of this appeal, I feel bound to express my dissent from the concluding part of the second finding in the interlocutor appealed from which affirms the "power and discretion" of the appellant to allow the use of the area in question, for purposes of public interest or utility, on market days and during the ordinary market hours, for such length of time as may not cause material and serious inconvenience. In my opinion the appellants have no power which can justly be described as discretionary; they have no power to exclude the public from the use of the market during ordinary market hours; whatever amounts to such exclusion is an invasion of the public right, and the right of a member of the public to participate in that use does not in any degree depend upon his ability to prove that his exclusion would subject him to "material and serious inconvenience."

In disposing of the appeal before us, it has been necessary for your Lordships to form a judicial opinion upon this part of the second finding; but there is no cross appeal, and therefore the only course open to us is to affirm the interlocutor. But our affirmance of that part of it which has been withdrawn from our adjudication, is merely formal, and cannot, I apprehend, be regarded as constituting res judicata in a question with any member of the public who is not a party to this action.

LORD FITZGERALD:—

From the opening of the learned Lord Advocate, the moment I heard it, I came to the conclusion that the whole question before us here depends upon the construction and effect to be given to the Act of 1874, and that we might quite easily draw our pen through all matters antecedent to 1840, when the series of statutes which ended with the Act of 1874 began.

My Lords, it appears to me that the market and the market place in question are not what I would describe as a market or a market place under the charters, or any of the grants prior to 1840, but they are a statutory market in a statutory market place, and the rights of the public are now regulated entirely by statute and by bye-laws which have been regularly made under that statute. My Lords, I say no more than that, that being the case, I quite concur in the construction put upon the Act of 1874 by the noble and learned Lord on the woolsack and by my noble and learned friend opposite. In both their judgments, and in the reasons which they have given for them, I entirely concur.

LORD HALSBURY:—

In this case I do not think that we are engaged in discussing what might be described as market rights at common law. I have no doubt myself that the grantee of a market has at common law a right, except where the market is circumscribed by metes and bounds, to select within the ambit of his franchise what place he will hold that market upon; but when he has selected it he may appropriate to each part of the market that class of goods which he thinks fittest for exposition there. I have no doubt, therefore, that in that sense the grantee of a market at common law had an absolute discretion, a discretion which, I think, is not reviewable by any tribunal whatsoever. But, as has been already pointed out, we are not dealing with market rights at common law, we are dealing in truth not with market rights at all. I cannot help thinking that some confusion still arises from not sufficiently distinguishing a right to the perception of the profits of a market from the rights created in a particular building which is to be devoted to particular purposes.

Now, assuming the amount of right and discretion in the grantees of the market, the history of which we have had at considerable length, it seems to me that in 1874 the grantees of the market went to the legislature for power of increased taxation, and went to the legislature further for powers of compulsory purchase; that they included in their bill the Lands Clauses Act and the Markets and Fairs Construction Act of Scotland; and I think it has been established at your Lordships' bar that by that

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statute it was contemplated that the promoters should have in their power the discretion of using part of the building which was to be constructed under the powers of that Act, and by additional taxation, for purposes of general utility and convenience. My Lords, it seems to me that under these circumstances it was not unnatural that the legislature should, in granting the privileges which they did grant under that Act, have stipulated that the public should not be inconvenienced by the use of the building so to be constructed in such a manner as to exclude the public who wished to buy, and the public who wished to sell, from the market place which was to form part of the building to be erected under the powers and by the additional taxation to be provided by the Bill. The result of that is, that in considering what uses may be actually made of that building, one must look and see whether the Act of Parliament so obtained has not placed a restriction upon those uses when and so far as the building is intended to be applied to the purposes of a market.

It is unnecessary, I think, after what the Lord Chancellor has pointed out, to go further into the construction of the 8th section of the Act. It seems to me that while leaving the amplest and fullest discretion to the corporation in the use of the rest of the building, the legislature indicated that a particular portion of the building to be erected should be subject to the public right not controlled by the discretion of the corporation. While saying that, I do not suppose that it could be contended that the legislature intended to exclude the discretion properly applicable to the managers or owners of the market place in so far as it has been used for market purposes. I cannot doubt that for purposes of repairs, for purposes of cleansing, and for all purposes applicable to its use as a market, the managers and owners of the market place have the discretion which is incident to and forms a necessary part of the power of management given to them by the statute; and if the language which has been adverted to in the interlocutor, simply means a discretion of that kind incident to and forming a necessary part of the management of the market as a market, it may be that those words may be supported. If, however, they mean what I am bound to admit they more naturally point to, a discretion as to whether that portion of the

building shall be used as a part of the market or not, and that the corporation have some kind of discretion to determine whether or not, with reference to objects of public utility, that market place shall be used for a fishery exhibition, or any other exhibition which they think would be useful to the public, then I am bound to say that I disagree with that portion of the interlocutor.

For these reasons, I concur in the judgment which the Lord Chancellor has moved, namely, that the appeal should be dismissed.

Interlocutors appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, 18th February, 1886.

Agents for appellants: *A. Beveridge and J. Graham, for William White Millar, S.S.C., Edinburgh.*

Agents for respondents: *Neish & Howell, for Nisbet & Mathison, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

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FLEMING AND OTHERS . . . . . APPELLANTS;

AND

HISLOP AND OTHERS . . . . . RESPONDENTS.

Inferior Court—Appeal—Scottish Judicature Act, 1825 (6 *Geo.* 4, *c.* 120), *s.* 40 —*Question of Fact or Law.*

Sect. 40 of the 6 Geo. 4, c. 120, provides that where a cause is commenced in the Sheriff Court or other Inferior Court, and a proof is allowed, the judgment shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law.

An action was raised in the Sheriff Court for declarator that the burning of certain heaps of mineral refuse would cause serious nuisance and annoyance to the proprietors of adjacent residential houses. On appeal to the Court of Session, that Court found that the ignition of the heaps "would cause material discomfort and annoyance:"—

Held, that this finding was not upon a question of law, and therefore not the subject of appeal.

Interdict—Nuisance.

The words of an interdict or injunction against causing a nuisance ought not to be so drawn as to shut out all scientific attempts to attain the desired end without causing a nuisance.

APPEAL from the Second Division of the Court of Session, Scotland.

The appellants are the trustees of the Kelvinside Estate Company. The respondents are their feuars and certain adjacent proprietors. Kelvinside is now a portion of the west end of Glasgow. Prior to 1881 there was a considerable mineral working on the estate, which ceased in that year. During the mineral working large heaps of an inflammable refuse substance, known as "blaes" or "shale" were thrown on the ground. The largest heap (of those involved in the present appeal) contained over 100,000 tons, and the smallest over 5000. As the mineral working came to an end, the appellants feued off portions of the estate in feuing lots; some for the erection of public buildings, but others for the erection of detached villas, and streets for houses

of a high class. At this time the heaps were on the ground in immediate proximity to the site of the houses now erected. The appellants, to reduce the heaps to a material available for road making, &c., proposed to set them on fire.

In December, 1881, the smallest heap known as "Pit No. 6" was ignited, and burnt for four or five months. Thereupon the respondents raised this action in the Sheriff Court of Lanarkshire, that the appellants might be ordained to extinguish that heap; and that they might be interdicted from, inter alia, burning or calcining any other heap or bing of blaes in the vicinity of the respondents' properties. They alleged that the burning caused intolerable discomfort, and would render their houses uninhabitable. The appellants averred that the burning was the last act connected with dealing with the estate as mineral property, and was the usual way of disposing of such refuse.

A proof was allowed, by which it appeared that once the heaps were ignited, it was very difficult to extinguish them. On the other hand, it was contended that in their present condition the heaps were unsightly and unsaleable, and that it would cost an immense sum to remove them by cartage.

On the 17th of April, 1882, the sheriff-substitute (Spens) found in favour of the respondents, and granted an interdict against the defenders (appellants) setting fire to any of the heaps "in respect that a nuisance would be caused thereby."

On the 13th of July of the same year, the sheriff (Clark) held that no case had been made out by the respondents for the interference of the Court, and refused the interdict.

On appeal by the respondents to the Court of Session, their Lordships of the Second Division on the 22nd of December, 1882, pronounced the following interlocutor:—

Find that in the circumstances of the case it is unnecessary to pronounce any order in regard to the blaes heap, or bing of blaes, on Semple's Farm, Kelvinside (Addie's Pit, No. 6 (1)): Quoad ultra find that the ignition of any other heap or bing of blaes on said farm, or in the vicinity of the pursuers' land, would cause material discomfort and annoyance to the pursuers: therefore sustain the appeal, recal the interlocutor of the sheriff of the

(1) This heap had by this time burnt itself out.

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13th of July last; Affirm the interlocutor of the sheriff-substitute of the 17th of April last; Of new interdict the defenders from burning or calcining the said heaps or bings of blaes other than the heap or bing No. 6 Pit: Find the pursuers entitled to expenses in the Inferior Court and this Court: Remit to the auditor to tax the same and to report, and decern (1).

Feb. 26; March 1. *The Lord Advocate* (*Balfour*, Q.C.), and *J. P. B. Robertson*, Q.C., for the appellants:—

The whole case is open to review notwithstanding the 40th section of the Scottish Judicature Act, because it cannot be said that the finding that the ignition would cause material discomfort, &c., is a pure finding of fact. It was nothing more than an expression of judicial belief which might or might not be justified. If the House is against the appellants on this point, then the finding is in the circumstances not sufficient in law to warrant an interdict. It was not sufficient under all circumstances to say that a particular thing would cause a nuisance without specifying time and place. There are many things residents in a mining district or manufacturing town have to submit to which are not incurred by persons resident in a purely agricultural locality.

[LORD HALSBURY:—*Hole* v. *Barlow* (2) has been long since overruled (3).]

The appellants' contention is, that if persons come to a place where a certain operation is carried on and obtain land from the person who is carrying it on, there may be an obligation on those persons to submit to any discomfort caused by those operations.

Lord Cranworth, in *St. Helen's Smelting Works* v. *Tipping* (4), said he "perfectly remembered trying a case in the county of Durham where there was an action for injury arising from smoke in the town of Shields. It was proved incontestably that smoke did come, and in some degree interfere with a certain person, but I said, 'You must look at it not with a view to the question

(1) 10 Court Sess. Cas. 4th Series, 426.

(2) A brick burning case, 4 C. B. (N.S.) 334.

(3) See *Bamford* v. *Turnley*, in Ex. Ch. 31 L. J. (Q.B.) 286; and *Cavey* v. *Ledbitter*, 13 C. B. (N.S.) 470.

(4) 11 H. L. C. at p. 653.

whether, abstractly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields;' because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance." These observations apply here.

The finding of the sheriff-substitute was, "that a nuisance would be caused," and the Court of Session, though they affirm his interlocutor, may be presumed to negative that finding, as their finding differs.

At all events the interdict of the Court of Session ought to be altered so as to safeguard any attempt of the appellants getting rid of the heaps without creating a nuisance. As the interdict at present stands it is an absolute prohibition against calcination by any means, scientific or otherwise.

[LORD WATSON:—Under this interlocutor the appellants could not burn a cartload.]

H. Davey, S.G. (with him, *Ure*), for the respondents, was heard on the point only as to modifying the interlocutor.

The following judgments were delivered:—

EARL OF SELBORNE:—

My Lords, I believe all your Lordships are clearly of opinion that in substance the interlocutor appealed from is right. The sole question on which you thought it necessary to hear the Solicitor-General is one really of form and not of substance.

The first question which was argued was to what extent this interlocutor now under appeal is appealable under the Scotch Judicature Act (1). Now, by that Act it is laid down in the clearest possible terms that a judgment of this nature "shall be subject to appeal to the House of Lords, in so far only as the same depends on or is affected by matter of law, but shall in so far as relates to the facts, be held to have the force and effect of a special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor." The Act assumes,

(1) 6 Geo. 4, c. 120.

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rationally I should say, that a finding must be either of fact or of law. Here you have a finding "that the ignition of any other heap or bing of blaes on said farm or in the vicinity of the pursuers' lands would cause material discomfort and annoyance to the pursuers," and upon that a conclusion introduced by the word "therefore" is founded. Is that fact or is it law? The appellants do not pretend to say that it is law; and if it be not law it would seem from the very terms of the Act which I have read, that it cannot be the subject of appeal. It is suggested that it is neither fact nor law; not fact, because it relates to something which it is said is prospective, future, not actually in existence. Well it is difficult to follow such an argument, especially if, as here, it is not an immaterial finding, but a finding most material to the conclusions built upon it. Nobody can say that without such a finding it would be right to grant an interdict. The thing had not actually happened in the particular case, and of course, therefore, the finding of the fact as a thing past was impossible. But it is a most strange proposition that a finding so material as to justify a conclusion of law, though not itself a finding of law, is not a finding of fact within the meaning of the Judicature Act. In truth, if one were to pass from law to practical reason, it is clear that there is a fallacy in saying that, because the word "would" is a word of futurity, the words "would cause" do not mean something which is properly a fact. From a certain state of facts existing in nature it is scientifically ascertained, that a certain consequence will follow.

My Lords, I will not dwell further upon that point, but will simply say that I entertain no doubt that within the meaning of the Judicature Act that is a finding of fact, and unappealable; and, having got so far, it appears to me also to follow as a necessary inference of law from that finding of fact, that an interdict against a thing which would cause such material discomfort and annoyance is proper to be granted. The word "material" is of great importance there—it excludes any sentimental, speculative, trivial discomfort or personal annoyance of that kind, a thing which the law may be said to take no notice of and to have no care for.

Of the cases of this kind in England, I think one of the earliest

was a case of brickmaking, *Walter* v. *Selfe* (1), before Knight Bruce, V.C.; and all the cases which have followed it, have laid down this proposition, in substance, and very nearly in words, if I am not mistaken, that what causes material discomfort and annoyance for the ordinary purposes of life to a man's house or to his property, is to be restrained, subject of course to any questions which the circumstances of the particular case may raise; and that, although the evidence does not go to the length of proving that health is in danger.

Therefore, all that remains is to consider whether the form of this interlocutor is such that it ought to remain without alteration. I speak here with diffidence, in the presence of my noble and learned friend, who will presently address your Lordships, and who is more familiar than I can pretend to be with the usual course of the Court of Session in all matters of form; but I understand from my noble and learned friend that it is his impression that it is not usual at once to affirm an interlocutor containing an interdict, and to go on to pronounce a new interdict in the order of affirmance, unless, indeed, it is meant to interdict something more than has been interdicted by the interlocutor affirmed; and, therefore, that in that respect it may be more convenient to place the effect of the new interdict beyond all doubt by, in point of form, recalling the interdict granted by the interlocutor which is in substance affirmed and embodying the whole interdict which is to be operative in the order of the Inner House; and my noble and learned friend will state to your Lordships the manner in which he conceives that ought to be done.

But then remains the question whether the interdict should be so absolute as it appears here and in the interlocutor of the sheriff-substitute to be, against any burning or calcining of the heaps or bings of blaes, which we all agree are only those four which are mentioned in the interlocutor of the sheriff-substitute, and not bing No. 6. It has been suggested at the bar that possible inconvenience of an unnecessary kind, not beneficial to the pursuers, and injurious to the defenders, might arise if the terms of the interdict are so absolute as they are there expressed to be. I own, my Lords, that I feel to a certain extent hesitation and difficulty,

(1) 4 D. & S. 315, 326; 20 L. J. (Ch.) 433; 15 Jur. 416.

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more of a technical than of a substantial kind, upon this point; and for this reason, that the finding is, that the ignition of any other heap or bing would cause material discomfort and annoyance, and the interdict is only against burning or calcining. Well, "burning" and "ignition" primâ facie seem to be very much the same thing. Whether any calcining is possible without burning I will not undertake to say, but I rather suppose that it was thought not to be so. Therefore, technically, it would seem that the interdict and the finding of fact upon which it is founded are co-extensive, at least so far as burning goes, and therefore that we cannot disturb the finding of fact. The rest, it may be said, is a proper conclusion from it. My Lords, although it be a proper conclusion in that technical sense, yet I do not think it is the only way in which effect can properly be given to the finding of fact. That finding is reasonably to be understood with reference to those matters which are not in controversy, being pleaded upon the record; and from them I think your Lordships can collect, that an ordinary open-air burning was what was in view, the only fact about which the parties came to the Court; and that none of them had any idea of any possible modes of dealing with these heaps which might involve the use of fire, without producing the discomfort and annoyance complained of by the pursuers. And on the whole I cannot help thinking, that it may be safer and quite consistent with justice, while adhering in substance to the interlocutor, to modify it in the way which has been suggested; that is to say, to interdict absolutely the burning or calcining of any of these heaps or bings of blaes in the manner which is complained of by the pursuers, adding, as was added in the *Shott's Case* (1), "or in any other manner so as to cause material discomfort and annoyance to the pursuers." Justice would be done in that way. It is not authorizing new experiments. It is not inviting experiments which may produce discomfort and annoyance to the pursuers, because it would be as much a breach of that interdict to use any other method which had that effect as it would be to go on with the old method.

My Lords, I therefore move your Lordships with those

(1) 7 App. Cas. at p. 546.

variations to affirm the interlocutor. My Lords, I cannot help thinking that those variations ought to make no difference at all in the costs of the appeal, which ought to be paid by the appellants.

LORD WATSON:—

My Lords, I entirely concur in what has been said by the noble and learned Earl.

I think it is perfectly clear that the statute of 6 Geo. 4, c. 120, contemplated that there should be only two classes of findings: findings of fact and findings of law. It appears to me that the finding which in this case is said to be matter of opinion and not matter of fact is, notwithstanding the somewhat metaphysical argument of the Lord Advocate, clearly a finding of fact within the meaning of the statute; and it appears to me to be equally clear that the necessary result of that finding is, that the respondents are entitled to protection against the threatened operations of the appellants. But I am not disposed to deal with the word "ignition," or to construe the word "ignition" as has been suggested by the counsel for the respondents. I think that word must be read with reference to the record; and it is plain that all that the complainers represented would be injurious to them was this, that if the appellants went on to set fire to the bings still unconsumed, in the same way as they had set fire to the bing at pit No. 6, the result would be to their nuisance. I do not think they meant to aver, and I do not think the Court meant to find that by no possible means, either at present or in the coming future, would it be possible to set fire to the mineral without causing material discomfort and annoyance. If it should prove to be impossible, the variations of the interlocutor which have been proposed by the noble and learned Earl will give the complainers full protection. I understand his Lordship's proposal to be that the appellants are to be interdicted from burning or calcining these heaps in the manner which they have previously practised with regard to the heap at pit No. 6, or for calcining or burning them in any other manner so as to occasion material discomfort and annoyance to the pursuers. If that interdict is complied with, it appears to me that the grievance complained of by the respondents altogether disappears. I do not think we need

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apprehend any breach of interdict or that operations will go on to their annoyance or discomfort; because it is a very serious matter to commit a breach of interdict—it not only lays the party open to an action for the damage which his neighbour has sustained through his forbidden operations, but it subjects him to serious penalties, either of imprisonment or fine in the discretion of the Court. These appear to me to be ample safeguards; and I do not think that any circumstances have been shewn in this case which would warrant us in pronouncing such a judgment as that by no possibility can this proprietor in the future get rid (and it is desirable in the interest of all parties that he should get rid) of this material which is lying upon his ground by the agency of fire, even although the discoveries of science should enable him to do so without causing the slightest discomfort or annoyance to any resident in the vicinity.

LORD BRAMWELL:—

My Lords, I am entirely of the same opinion. I have no doubt that the finding which is in question, is a finding of fact. But supposing it is not, it certainly is not a finding of law; and it is only in the case of a decision in point of law that such a proceeding as this is the subject of appeal. It is of no use for the appellants to make out that this is something, (if such a thing is possible,) which is neither fact nor law, because unless they can make out that it is law, there is no appeal.

With respect to the finding it appears to me, judging it from an English lawyer's point of view, that it is a proper finding. The word "material" is one used continually in endeavouring to explain to a jury what it is which would constitute a nuisance as distinguished from something which might, indeed, be perceptible, but not of such a substantial character as to justify the interference of the Court or allow the maintenance of an action; in conformity with the legal maxim, "Lex non favet delicatorum votis." It appears to me to be a right finding.

Just one word as to the last point. I cannot think that the word "ignition" in the finding means the mere setting fire to the heap. I think that we must give a sensible meaning to it, and we cannot suppose that the mere setting fire to the heap would cause a material discomfort and annoyance to the pursuers.

I think that it was not the intention of the Court to affirm that it was so, because they proceed not to interdict an ignition, but to interdict a burning or calcining. Well, but then the Solicitor-General says that if you once light it you cannot put it out. That is more than we know. It may have been said so in the evidence, but it does not appear in the judgment, and, for my own part, I do not believe it. I think it is very probable that when the bulk of the heap was on fire it would be extremely difficult to put it out; but, upon its first ignition, I cannot see that it could not be put out by cutting off communication with the rest of the heap, or by bringing something to bear upon it. At all events, we do not know that it could not be put out.

Therefore, I read the word "ignition," in the finding, as meaning the same thing as is interdicted, namely, "burning." Then, if that is so, one must take it to be an interdict against the burning in such a way as to cause material discomfort and annoyance. Consequently, I think that the proposed alteration may be properly made without any inconsistency with the opinions which have been expressed as to the finding or interdict.

LORD FITZGERALD:—

My Lords, I entirely concur; and it appears to me that there is only one question in the case, namely whether the interlocutor of the Inner House has, as a matter of fact, found, that the burning of these bings would create discomfort and annoyance to the neighbours.

I entirely adopt the construction put upon the statute by the noble and learned Earl who proposed the judgment. Then, upon that finding, a question of law has arisen as to whether the finding in fact was sufficient in law to warrant the interdict which has been made. But I observe that the learned Lord Advocate did not contest that proposition—he did not venture for a moment to say that it was not sufficient in law to maintain the interdict if there had been this finding, in fact, against which he could not appeal—in truth it would have been useless for him to do so. There is no difference in this respect between the law of England and the law of Scotland—they rest upon the same principle—both acknowledge the undoubted right of the

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proprietor to the free and absolute use of his own property; but there is this restraint or limitation imposed for the protection of his neighbour, that he is not so to use his property as to create that discomfort or annoyance to his neighbour which interferes with his legitimate enjoyment.

There being no question of law in contest at all before us, I forbear from making the observations which, if it had been contested, I might have thought proper to make, and I shall only remind your Lordships of this, that it was clearly impossible to maintain a proposition of law favourable to the appellants; for the language in this case is, sensible and personal discomfort, and that which creates in your neighbour sensible and personal discomfort is a nuisance which the law prohibits.

LORD HALSBURY:—

My Lords, I am entirely of the same opinion. I should only like to say, with reference to the supposed difficulty in construing language which refers to future injury, that it appears to me that there is a fallacy involved in taking these words as if it was absolutely essential to establish a fact which is past in order to establish that the proposition is a proposition of fact only. A large quantity of gunpowder, say, has been held to be a nuisance if stored up in a place unfit for the purpose, so that its explosion would do mischief. The fact of the explosive character of the gunpowder is an existing fact; but could it be said that in arguing about the danger and unlawfulness of having a large quantity of gunpowder near you, if the language was such as to import futurity, namely, that it *would* explode and that it *would* do mischief if exploded, that was merely the language of conjecture and prophecy and not an allegation of fact? It appears to me to be strictly an allegation of fact. The quality of the thing is such that it *is* dangerous and *is* likely to do mischief, and if an explosion should take place it would cause disaster and injury to others.

My Lords, there is only one other observation which I should like to make, and that is with reference to a phrase which occurs in the judgment of the Lord Justice Clerk (1), which I think may give rise to error hereafter. If the Lord Justice Clerk means to convey that there was anything in the law which diminished the

(1) 10 Ct. Sess. Cas. 4th Series, at p. 432.

right of a man to complain of a nuisance because the nuisance existed before he went to it, I venture to think that neither in the law of England nor in that of Scotland is there any foundation for any such contention. It is clear that whether the man went to the nuisance or the nuisance came to the man, the rights are the same, and I think that the law of England has been settled, certainly for more than 200 years, by a judgment of Lord Chief Justice Hide (1) with reference to a tan-yard, where the learned Judge pointed out that tanning was a lawful trade, for everybody wore shoes, and it was for the public advantage that shoes should be made, but he said that it must be in a convenient place. Unfortunately the term "convenient" there was misunderstood in much later times to refer to convenience which it was very difficult to distribute, because, as my noble and learned friend said the last time your Lordships met, the question was convenient to whom? But as used by the Lord Chief Justice it had a very intelligible meaning—it meant so convenient in the use that it should not be a nuisance to anybody; and in that sense of course the decision was right.

My Lords, it seems to me to be established clearly and beyond all doubt by a current of authorities, and to have been expressed with a degree of precision and logic in the judgment in *Bamford* v. *Turnley* (2), by my noble and learned friend on my right (Lord Bramwell), that what makes life less comfortable and causes sensible discomfort and annoyance is a proper subject of injunction; and it appears to me that, looking at the facts of this case (if we had to look at fact, which we have not), they are amply sufficient to establish such a state of things.

LORD ASHBOURNE:—

My Lords, I entirely concur in the opinions which have been delivered by your Lordships, and in the reasons upon which those opinions are based. I may say that I myself entirely agree in the view that, assuming the facts to be proved as stated, the interdict awarded by the Court below was an appropriate and

(1) *Jones* v. *Powell*, Palmer, 536, 539; Hutton, 135; Gale on Easements, 5th Ed. p. 503.

(2) 3 B. & S. at p. 82; 31 L. J. (Q.B.) at p. 293.

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proper remedy. My Lords, I am equally satisfied that it is both in accordance with justice and eminently reasonable to qualify that interdict by taking note of the processes which science may hereafter discover and shew to be appropriate, so as to guard the possible use of these heaps in such a way as to avoid causing discomfort and annoyance to the pursuers and others entitled to complain.

My Lords, I may say with reference to the argument of the Solicitor-General, very concise and very clear, that I am not satisfied that the qualification proposed can occasion the slightest possible inconvenience or injustice to the pursuers. The introduction of the words which have been mentioned by my noble and learned friend near me and by the noble and learned Earl on the woolsack does not indicate or suggest any encouragement whatever to adopt any process which can by any possibility work out material discomfort or annoyance to the pursuers or to anybody else.

Interlocutor of Second Division varied by deleting in line 8, *the word "affirm," and substituting therefor the words "recal the interdict granted by;" and by inserting after the words, in line* 9, *"April last," the words "and quoad ultra affirm the said interlocutor;" and by inserting in line* 11, *after the words "No.* 6 *pit," the words "in the manner practised by them in respect of the said heap or bing No.* 6 *or in any other manner so as to occasion material discomfort and annoyance to the pursuers or any of them."*

With these variations interlocutor appealed from affirmed.

The appellants to pay the costs of this appeal.

Lords' Journals, March 1, 1886.

Agents for appellants: *Grahames, Currey, & Spens, for H. & F. Dewar, W.S., Edinburgh, and Montgomerie & Flemings, Glasgow.*

Agent for respondents: *Andrew Beveridge, for Beveridge, Sutherland, & Smith, S.S.C., Edinburgh, and Fisher, Watt, & Hayes, Writers, Glasgow.*

[HOUSE OF LORDS.]

PROVOST OF GLASGOW . . . . . APPELLANT;

AND

POLICE COMMISSIONERS OF HILLHEAD . . . . . } RESPONDENTS.

H. L. (Sc.)
1886
May 14.

Bridge—Liability for Maintenance—Bridge partly in one County and partly in another—Roads and Bridges (Scotland) Act, 1878 (41 & 42 *Vict. c.* 51), *ss.* 37 & 88—13 *Vict. c.* 21, *s.* 4.

By the Roads and Bridges (Scotland) Act, 1878, sect. 88, after reciting that "there are or may be bridges in Scotland which accommodate, or may accommodate, the traffic, not only of the county or counties, or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county, or of other counties, and burgh or burghs, or one or more of them, and it is not reasonable that the whole burden of managing, maintaining, repairing, and if need be, rebuilding such bridges, and of paying the debt affecting, or which may affect the same, should be imposed upon the county or burgh within which they are so situated," provision is made for proceedings whereby the localities in which bridges are situate may be relieved of part of the expense of maintaining them where they accommodate the traffic of other localities:—

Held, affirming the decision of the Court below, that the provisions of the section are applicable to bridges locally situate in more than one county or burgh.

APPEAL from the First Division of the Court of Session, Scotland (1). The facts are fully set out in the judgments.

The 37th section of the Roads and Bridges (Scotland) Act, 1878, provides that where a bridge is not situate wholly within one county or burgh, the expense of maintenance, and, if need be, of rebuilding, shall, failing agreement, be a charge equally against the trustees of the county or counties and local authority or authorities of the burgh or burghs within which it is partly situated.

The 88th section was, inter alia, as follows:—

"Whereas there are or may be bridges in Scotland which accommodate or may accommodate the traffic not only of the county or counties, or burgh or burghs, as the case may be,

(1) 12 Court Sess. Cas. 4th Series, 864.

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within which they are locally situated, but also of the adjoining county, or of other counties and burgh or burghs, or one or more of them, and it is not reasonable that the whole burden of managing, maintaining, repairing, and, if need be, rebuilding such bridges, and of paying the debt affecting, or which may affect, the same, should be imposed upon the county or burgh within which they are so situated: Be it enacted, that in respect of such bridges the following provisions shall have effect:—(1) The trustees of counties and burgh authorities may agree that any such bridge accommodates other traffic than that of the county or burgh in which it is situate, and may agree as to the proportions in which the debt (if any), and the cost of maintenance, and, if need be, of rebuilding such bridge, shall be borne and defrayed by the county or counties and burgh or burghs to which it is common; and such agreement, when confirmed by a resolution of the trustees in general meeting, and of the burgh authorities, shall have the same force and effect as an order by the Secretary of State, as provided hereinafter: (2) It shall be lawful for the county road clerk, or clerk of supply, of any county, or for the town-clerk or clerk of any burgh, to apply to the Secretary of State to determine that any bridge locally situated within a county or burgh in respect of its accommodating other traffic than that of such county or burgh only, shall be deemed to belong in common to the county or counties, and burgh or burghs, to be named in his determination:—(3) Upon such application being presented to the Secretary of State, he may, if he shall think fit, by any writing under his hand, appoint any two persons, as commissioners, to institute a local inquiry as to the circumstances of the case, and, after hearing all parties interested, to report thereon to the Secretary of State, ... (4) If the commissioners are of opinion that the Secretary of State should determine that the burden of managing, maintaining, repairing, and, if need be, rebuilding the bridge mentioned in the application, and of paying the debt affecting or which may affect the same, should not be borne wholly by the county or burgh within which the same is locally situated, they shall prepare and transmit along with their report the draft of the determination which they recommend that the Secretary of State

should make, setting forth therein the proportions in which such burden should be borne by the county or counties, or part or parts, or district or districts, of such county or counties, and by the burgh or burghs named in the determination: (5) The Secretary of State after such further inquiry, if any, as he shall deem necessary, may approve of the draft submitted with or without alterations, and any determination made by him under his hand and seal shall have the same effect as if it were contained in this Act: Provided always, that such determination shall be laid before both Houses of Parliament," &c.

On appeal.

March 19. Sir *R. Webster*, Q.C., and *J. P. B. Robertson*, Q.C. (with them *Lang*), for the appellants:—

If sect. 88 is held to apply to the bridges here, a greater burden than one half of the reduced total liability may be thrown upon Glasgow: it having more than ninety-nine per cent. of the accommodation.

The *Lord Advocate* (*Balfour*, Q.C.), and *Begg*, for the respondents:—

The primary scheme of the Act was to sustain the bridges by rates instead of by tolls. The Secretary of State could not make each county bear more than one half, though in a case such as this he might give more relief to one than to another.

J. P. B. Robertson, in reply.

Judgment was delivered as follows:—

LORD HERSCHELL, L.C.:—

My Lords, this action was brought by the Lord Provost, magistrates, and town council of Glasgow, in order to interdict the defenders, the Commissioners of Police of the borough of Hillhead, from proceeding in any inquiry instituted under sect. 88 of the Roads and Bridges (Scotland) Act, 1878, with respect to two bridges across the River Kelvin, both of which are situate partly within the city of Glasgow and partly within the borough of

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Lord Herschell, L.C.

Hillhead. The Lord Ordinary assoilzied the defenders from the conclusions of the action, and his interlocutor was affirmed by the First Division of the Court of Session (1).

The determination of the action depends upon the construction of sect. 88 of the Roads and Bridges (Scotland) Act, 1878, which provides for certain proceedings whereby the localities in which bridges are situate may be relieved of a portion of the expense of maintaining them where they accommodate the traffic of other localities.

The contention on the part of the plaintiffs is that the proceedings instituted by the defenders, though they would have been lawful if the bridges in question had been situate entirely in one burgh, were not authorized by the enactment, which it was contended is inapplicable to bridges situate partly in one burgh and partly in another. The sole question in the action is whether this contention is well founded.

The preamble of sect. 88 is in these terms:—"Whereas there are or may be bridges in Scotland which accommodate or may accommodate the traffic not only of the county or counties, or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county or of other counties, and burgh or burghs, or one or more of them, and it is not reasonable that the whole burden of managing, maintaining, repairing, and, if need be, rebuilding such bridges, and of paying the debt affecting or which may affect the same, shall be imposed upon the county or burgh within which they are so situated."

It appears to me clear that the language of this preamble, which speaks of bridges accommodating the traffic of other localities than "the county or counties or burgh or burghs" in which they are locally situate, applies in express terms to bridges locally situate in more than one burgh. And no reason was, or, I think, could be, suggested in argument why the mischief recited in the preamble, and which the enactment was intended to remove, existed less in the case of such bridges than in the case of a bridge situate entirely within the ambit of a single county or burgh. One would expect, therefore, to find that the enactment, following a preamble thus worded, would apply alike to all such

(1) 12 Court Sess. Cas. 4th Series, 864.

bridges. Accordingly, the enactment begins in these terms:— "Be it enacted that, in respect of *such bridges*, the following provisions shall have effect." This, in my opinion, makes all the provisions of the section expressly applicable to all such bridges as fall within the description of the preamble, including, therefore, bridges situate in more than one burgh. It is true that in the later part of the section it is provided that "it shall be lawful for the county road clerk or clerk of supply of any county, or for the town clerk or clerk of any burgh, to apply to the Secretary of State to determine that any bridge locally situated within a county or burgh in respect of its accommodating other traffic than that of such burgh or county only shall be deemed to belong in common to the county or counties and burgh or burghs to be named in his determination." It was argued that this language could not apply to a bridge situate partly in one burgh and partly in another. I am unable to arrive at such a conclusion. The language used might perhaps have been more apt, but, reading the whole section together, I see no difficulty in so construing these words as to include all the cases to which the earlier part of the section declares that the enactment is to apply. And I think that the 4th section of the 13 Vict. c. 21, makes it clear that this is the proper construction.

It has been argued that there is some inconsistency between the provisions of sect. 88, when thus construed, and the provisions of sect. 37. To my mind there is none. Sect. 11 of the Act provides that each county or burgh shall be bound to maintain that portion of the highway which is situate within it. But, inasmuch as it would have been very inconvenient that the liability to repair portions, and not always well defined portions, of a single structure like a bridge should devolve upon separate authorities, sect. 37 made the repair and maintenance of these structures a matter to be carried out jointly by the authorities of the several local areas in which they are situate.

To this extent it settled, I think conclusively, the liabilities of these authorities respectively. But sect. 88 has a totally different purpose. It is intended to meet the cases in which it is not fair that the locality or localities in which the bridge is situate should be left to bear the entire burthen of its repair by reason of its

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accommodating the traffic of other localities, and it provides a scheme by which some relief may be given to the authorities whose liability is created by the local situation of the bridge.

Upon the whole, therefore, I am of opinion that the interlocutor appealed from should be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

LORD WATSON :—

In this case the Lord Ordinary, and a majority of the learned judges of the First Division of the Court of Session, have decided that the provisions of sect. 88 of the Roads and Bridges (Scotland) Act, 1878, are applicable to a bridge locally situated in two burghs. The appellants maintain that the clause has exclusive reference to bridges which are wholly situated either in one county or in one burgh. I am of opinion that the decision of the Courts below is right, and that the interlocutors appealed from must be affirmed.

Sect. 11 of the Act of 1878 imposes upon county and burgh authorities the duty of managing and maintaining the highways and bridges within their respective areas. Had that been the only enactment upon the subject, in all cases where a bridge is partly situated in two areas, whether county or burghal, each authority would have been charged with the maintenance of that portion of the fabric of the bridge and its approaches which was locally situate within its own territory. It is, however, provided, by sect. 37 that in such cases the whole cost of maintenance and repair shall be borne equally by the two authorities interested, the management of the bridge being vested in a joint committee to be appointed by them. A bridge cannot, like a road, be suitably apportioned between two sets of managers, because the stability of the fabric depends, more or less, upon the condition of all its parts; and the due maintenance of part of the fabric in one area might necessitate the repair of part situate in another area and under different management. The enactments of sect. 37 were manifestly intended to prevent disputes, and possibly disasters, which might have arisen under a system of divided management and responsibility.

The 11th and 37th clauses of the Act deal with the manage-

ment and maintenance of bridges upon considerations derived from the locality in which they are situated. Sect. 88, which your Lordships have to construe, relates to an entirely different subject-matter. Its provisions refer, not to the position of the bridge, as being within a particular area or areas, but to the character of the traffic which it accommodates. These provisions contemplate the case of bridges which accommodate not only the traffic of the areas in which they are situate, but also that "of the adjoining county or of other counties and burgh or burghs, or one or more of them;" and it appears to me that their object is to relieve the authority of the local area from the burden of maintenance, to an extent proportionate to the amount of such foreign traffic. It may be said that, in a certain sense, every bridge which is used by persons coming from another district accommodates the traffic of that district. I do not think that is the kind of case which sect. 88 was meant to provide for. But there may be, in a burgh for instance, a bridge which is extensively used for through traffic passing between two termini outside the burgh, or for other traffic which can in no reasonable sense be characterized as burgh traffic. That is the kind of case to which the provisions of sect. 88 apply; and if a burgh bridge does, in point of fact, accommodate foreign traffic of that description, there can, in my opinion, be no à priori probability that the legislature meant to give relief, provided such bridge was wholly within one burgh, and to withhold relief in the event of its being situated within two burghs.

For the purposes of this case, the preamble of sect. 88 is the most important part of the clause, seeing that it contains the only definition of the bridges which are to come under the operation of the clause. Its terms (so far as these bear upon the present question) are as follows:—"Whereas there are or may be bridges in Scotland which accommodate or may accommodate the traffic not only of the county or counties, or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county," &c., and then it is enacted that, "in respect of such bridges, the following provisions shall have effect." So that the enacting sub-sections are expressly made applicable to all the bridges described in the preamble itself. If

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the preamble had been otherwise expressed, if the words used had been either "the traffic of the county or burgh," or "the traffic of the counties or burghs" within which the bridges are "locally situated," it might have been plausibly argued that no bridge was meant to be included which was not a bridge in a county or a bridge in a burgh. Even in that case, it would not, to my mind, have been altogether clear that a bridge partly situated in a burgh was not a bridge situated in a burgh within the meaning of the preamble. But the expressions which do occur in the preamble, "the county or counties or burgh or burghs, as the case may be, within which they are locally situated," appear to me, according to their natural meaning, to include a bridge in two counties or in two burghs as well as a bridge wholly situated in one county or in one burgh. I am unable to discover any good reason for holding that the expression "bridges in a burgh or burghs" is exclusive of a bridge which happens to be within two burghs.

I am accordingly of opinion that the bridge in dispute, which is partly in the royal burgh of Glasgow, and partly in the police burgh of Hillhead, is within the class of bridges described in the language of the preamble, and may be brought under the operation of sect. 88 if, after the requisite statutory procedure has been followed out, the Secretary of State shall so determine. But it has been argued that the special enactments contained in sub-sects. (1) to (4) inclusive are expressed in terms which indicate that the Legislature did not intend the provisions of sect. 88 to apply to any bridge which is not wholly situated in one county or one burgh. It does not appear to me that these enactments are so framed as to exclude the case of a bridge situated in two burghs. Upon that point I agree with the reasoning of the majority of the Judges in the Court below, and shall not repeat it. But I desire to say that, even if it were shewn that the language of these sub-sections is inapplicable to a bridge within two burghs, it would not, in my opinion, be a necessary consequence that such a bridge was not entitled to the benefit of their enactments. The fact that the sub-sections were expressed in terms which, taken per se, would exclude some of the bridges mentioned in the preamble, would, in my opinion, be immaterial

when the Legislature has expressly enacted that they shall apply to all these bridges.

LORDS FITZGERALD and ASHBOURNE concurred.

Interlocutor appealed from affirmed, with costs.

Lords' Journals, 14th May, 1886.

Agents for appellants: *Simson, Wakeford, Goodhart, & Medcalf, for Campbell & Smith, Edinburgh.*

Agent for respondents: *W. A. Loch, for Morton, Neilson, & Smart, W.S., Edinburgh, and Muirhead & Guthrie Smith, Writers, Glasgow.*

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CANADIAN LAW—*New Brunswick—Consolidated Statutes, c.* 84, *ss.* 29, 30—*Limitation—Right to make Payments—Admission of Liability.*] The rule that the only person whose payment on account will prevent foreclosure from being barred is the mortgagor, or his privy in estate, or the agent of either of them, must be qualified so as to

CANADIAN LAW—*continued.*
include any person who by the terms of the mortgage contract is entitled to make payments.—Where H. and W. each mortgaged some property to the obligee of their joint and several bond, to secure the amount of the obligation, the latter as between the debtors being surety only, H. being bound to pay principal and interest and expressly named as a person entitled to redeem both mortgages, W. never having made any payment at all:—*Held*, in a suit for foreclosure, that the period of limitation prescribed by sect. 30 of c. 84 of the Consolidated Statutes of New Brunswick ran in respect of both mortgages from the date of the last payment of interest by H. Lewin *v.* Wilson [639

2. —— *Rights of the Crown in Lower Canada—Priority of Payment in respect of the Crown's "Comptables" — Sect.* 1994 *of Civil Code — Sect.* 611 *of Civil Procedure Code—Conflict between the Codes—Construction.*] *Held*, that the Crown is bound by the two Codes of Lower Canada, and can claim no priority except what is allowed by them. Being an ordinary creditor of a bank in liquidation, it is not entitled to priority of payment over its other ordinary creditors.—Prior to the Codes the law relating to property in the province of Quebec was, except in special cases, the French law, which only gave the King priority in respect of debts due from "comptables," that is, officers who received and were accountable for the King's revenues.—Art. 1994 of the Civil Code must be construed according to the technical sense of "comptables." And Art. 611 of the Civil Procedure Code, giving to the Crown priority for all its claims, must be modified so as to be in harmony therewith. Accordingly, by its true construction, the intention of the Legislature was that "in the absence of any special privilege the Crown has a preference over unprivileged chirographic creditors for sums due to it by the defendant being a person accountable for its money." Exchange Bank of Canada *v.* The Queen - - - - - 157

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CAPE OF GOOD HOPE, LAW OF—*Codicil—Construction.*] A testator and testatrix who had been married in community of property devised by codicil certain real estate to their two sons, with provisoes, first, in restraint of alienation; second, "the eldest son among our grandchildren shall always have the same right thereto, and after the decease of their parents remain in possession thereof, with this understanding, however, that the other heirs who may still be born shall enjoy equal share and right thereto . . . . to be for the convenience and benefit of our two children and grandchildren, so that always the eldest son of the grandchildren has the privilege, ... and the grandchildren can in our opinion earn their living thereon."—No other son was born, the younger entered into possession of half the property and died leaving ten children:—*Held*, that the respondent, who was the eldest of these ten children, was entitled to the whole of his father's moiety.—*Quære*, as to the true construction of the codicil if there were any attempt to create a perpetuity or entail. De Jager *v.* De Jager 411

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CHINA SETTLEMENTS, LAW OF—*Land and Municipal Regulations*, 1854, *Art.* 5—*Construction—Rights of Renters.*] *Held*, that according to the true construction of Art. 5 of the Regulations of 1854, (1.) the public uses to which beach grounds of the rivers are thereby dedicated are the uses to which such grounds in the district are ordinarily held subject; (2.) that such dedication does not deprive the renter of his property in the grounds, but obliges him to respect the uses; (3.) that every renter takes with the condition, express or implied, that his holding is subject to such uses; (4.) that jurisdiction is conferred to prevent anything (e.g., building thereon) being done inconsistent with or destructive to the rights of the public having uses on the beach ground. Ince *v.* Thorburn - - - - - 180

CHOSE IN ACTION—Order and disposition 426
See Bankruptcy. 2.
CIVIL CODE OF CANADA, s. 1994 - - 157
See Canadian Law. 2.
CIVIL PROCEDURE CODE, s. 611 - - 157
See Canadian Law. 2.
CODICIL—Cape of Good Hope - - 411
See Cape of Good Hope, Law of.
COLONIAL LAW—Canada - - 157, 639
See Canadian Law. 1, 2.
—— China Settlements - - - 180
See China Settlements, Law of.
—— India - - - - - 648
See Indian Law.
—— Jersey - - - - - 214
See Jersey, Law of.
—— Natal - - - - - 627
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—— New South Wales - - 192, 197, 619
See New South Wales, Law of. 1, 2, 3.
—— South Australia - - - 171
See South Australia, Law of.
—— Victoria - - - - 208
See Victoria, Law of.
COMMISSIONERS OF SEWERS—Disqualification 449
See Sea Wall.

COMPANY—*Shares—Certificates, Possession of—Transfer—Transfer in Blank—Delivery of Transfer by Transferor as his Deed—Equitable Mortgage of Shares—Notice—Priority—Maxim "Qui prior est tempore potior est jure"—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 30.] M., the holder of shares in a company, deposited with S. certificates of the shares and a blank transfer, as security for a debt. Afterwards he fraudulently executed a blank transfer in respect of the shares and deposited it with the appellants, as security for a

COMPANY—*continued.*

debt. On being applied to by the appellants for the share certificate he stated that it was lost or mislaid. The appellants stamped their transfer, filled up the blanks, had it executed by their manager as the transferee, and sent it to the company's office with a request that the company would "certify it," and with an indemnity against any claim in respect of the missing certificates. The company did not accept the indemnity and declined to certify. Shortly after the executors of S. (who had died) gave notice to the company of their charge upon the shares. The company was incorporated under the Companies Act, 1862. The articles of association provided that the shares should be transferable only by deed: that lost certificates might be renewed upon satisfactory proof of the loss, or in default of proof upon a satisfactory indemnity being given: and that the company should not be bound by or recognise any equitable interest in shares. Each certificate stated, under the company's seal, that no transfer of any portion of the shares represented by the certificate would be registered until the certificate had been delivered at the company's office. The appellants having brought an action against the executors for a declaration of their title to the shares and to restrain the executors from dealing with the shares:—*Held*, affirming the decision of the Court of Appeal, that the transfer to the appellants not having been re-delivered by the transferor after the blanks were filled up was not his deed and that the appellants had no legal title to the shares: that as between themselves and the company they never had an absolute and unconditional right to be registered as the shareholders: that nothing that had happened gave them a right on equitable grounds to displace the original priority of the equitable claim of the executors: and that the action could not be maintained.—*Hibblewhite* v. *McMorine* (6 M. & W. 200) approved.—*Held*, also, by the Earl of Selborne, that the principle of *Dearle* v. *Hall* (3 Russ. 1), as to the effect of notice in determining the priorities of equitable rights is inapplicable to shares in such a company. Société Générale de Paris *v.* Walker - - - - - 20

—— Railway company - - 45, 97
See Railway Company. 1, 2.
—— Railway company—Compensation—Law of Victoria - - - - 208
See Victoria, Law of.
"COMPTABLES" - - - - 157
See Canadian Law. 2.
CONTRACT—With Crown - - - 607
See Petition of Right.
CORPORATION—Action for malicious prosecution
See Malicious Prosecution. [247
—— Power of—Scotch law - - - 665
See Scotch Law. 5.
CROSS-EXAMINATION—Affidavit - 541
See Estoppel.
CROWN—Petition of right - - - 607
See Petition of Right.

DAMAGES—Contract with Crown - - 607
See Petition of Right.

DAMAGES—*continued.*
—— Libel - - - - - 187
See Libel.
—— Penal and liquidated - - - 332
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—— Subsidence of land - - - 137
See Limitations, Statute of.
DEDICATION — Highway — Subject to market rights - - - - 66
See Market.
—— Highway - - - - 214
See Jersey, Law of.
—— Highway—Market rights - - 66
See Market.
DISQUALIFICATION—Commissioners of sewers
See Sea Wall. [449
DISSOLUTION OF MARRIAGE — Evidence — Ireland - - - - 294
See Husband and Wife.
DISSOLUTION OF PARTNERSHIP - 298
See Partnership.
DISTRIBUTION OF REAL ESTATES—New South Wales - - - - 619
See New South Wales, Law of. 3.
DISTURNPIKED ROAD - - - 416
See Highway.
DIVORCE—Ireland - - - - 294
See Husband and Wife.
DOMICIL—Judgment of Probate Court - 541
See Estoppel.

ENTAIL—Scotch law - - - 394
See Scotch Law. 6.

ESTOPPEL—*Res judicata—Judgment in rem—Judgment inter partes—Probate Court, Decree of as to Domicil—Judgment, finding of Issue not necessary to.*] A native of Chili made his will in London and died. A caveat having been entered on behalf of his daughter, the executors propounded the will in solemn form, alleging that the testator was domiciled in England. The daughter pleaded that the deceased was at the date of the will and until his death domiciled in Chili, and that the will was not duly executed according to the law of Chili. Upon this plea (inter alia) the executors took issue. The judge of the Probate Court made a decree by which he pronounced for the validity of the will, found that the deceased was at the date of the will and at his death a domiciled Englishman, and decreed probate to the executors. The daughter afterwards filed a bill against the executors, alleging that the testator was a domiciled Chilian, that his will being executed in England according to English law was good by the law of Chili but so far only as the testator could by the law of Chili dispose by will of one-fourth of his personal estate, and that the other three-fourths belonged to the daughter. The executors by answer set up the decree of the Probate Court as a bar. An order having been made for inquiry as to the testator's domicil, in an administration suit under circumstances which (it was contended) made it equivalent to an order in the suit by the daughter against the executors, the question whether the order was right was litigated between the daughter and the residuary legatee:—*Held*, affirming the decision of the Court of Appeal (29 Ch. D. 268), that the decree of the Probate Court was not conclusive in rem as to the domicil, because the finding as to the domicil was not necessary to the decree:—*Held* also, affirming the decision of the Court of Appeal, that for the same reason the decree of the Probate Court was not conclusive inter partes as to the domicil, as between the daughter and the residuary legatee, for the executors could not, by litigating in the Probate suit a question of domicil which it was not necessary to decide for the purposes of that suit, conclude the residuary legatee as to the testator's power of disposing of his property, and that as the residuary legatee was not bound the daughter could not be bound, since estoppel must be mutual. Concha *v.* Concha - - 541

EVIDENCE—*Legitimacy—Paternity of Child born in Wedlock—Husband and Wife, Statements by, as to Paternity.*] Where the legitimacy of a child born in wedlock is in issue, previous statements by the mother that the child is a bastard are admissible as evidence of her conduct, although she could not be allowed to make such statements in the witness box. The Aylesford Peerage 1
—— Contents of lost will - - - 469
See Probate.
—— Cross-examination on affidavit — Witness out of jurisdiction - - - 541
See Practice. 3.
—— Divorce—Ireland - - - 294
See Husband and Wife.

FALSE REPRESENTATION—*Vendor and Purchaser—Sale under the Direction of the Court—Misrepresentation and Concealment of Facts by Purchaser.*] The proposition laid down by the Court of Appeal, that "a person desirous of buying property which is being sold under the direction of the Court must either abstain from laying any information before the Court in order to obtain its approval, or must lay before it all the information he possesses, and which it is material that the Court should have to enable it to form a judgment on the subject under its consideration," is too broadly stated.—It does not follow that because information on some material point or points is offered, or is given on request, by a purchaser from the Court, it must therefore be given on all others as to which it is neither offered nor requested, and concerning which there is no implied representation, positive or negative, direct or indirect, in what is actually stated.—The decision of the Court of Appeal (27 Ch. D. 424) reversed upon the evidence, and the order of Fry, J. (23 Ch. D. 302) restored. Coaks *v.* Boswell 232
FORECLOSURE—Banking company—New South Wales - - - - 192
See New South Wales, Law of. 1.
—— Mortgage—Statute of Limitations - 639
See Canadian Law. 1.
FOREIGN SHIP—Necessaries - - 270
See Ship.

GENERAL LINE OF BUILDINGS - - 257
See Metropolis Management Acts.
GRANT—Market - - - - 66
See Market.

HIGHWAY—*Highways and Locomotives (Amendment) Act* 1878 (41 & 42 *Vict. c.* 77) *s.* 13—*Disturnpiked Road—Cesser of Turnpike Road—Main Road—Towns Improvement Clauses Act* 1847 (10 & 11 *Vict. c.* 34) *ss.* 47, 49, 50, 51.] In 1855 a portion of a turnpike road was included in an improvement district under a local Act incorporating the Towns Improvement Clauses Act 1847 (10 & 11 Vict. c. 34). Thereupon by virtue of sects. 47–51 of the latter Act the maintenance of this portion of the road became vested in the improvement commissioners and the turnpike trustees ceased to have power to collect tolls or lay out money upon it. In 1877 the turnpike trust expired. The commissioners were the "highway authority" for the district, and the district was a "highway area" within the meaning of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77) s. 13:—*Held*, affirming the decision of the Court of Appeal (15 Q. B. D. 25), that notwithstanding the operation of sects. 47–51 of the Towns Improvement Clauses Act 1847 the road only "ceased to be a turnpike road" and became a "main road" within the meaning of sect. 13 of the Highways and Locomotives (Amendment) Act 1878 upon the expiration of the turnpike trust; and that since that event happened after 1870 the county authority was liable to pay to the commissioners one-half the expenses incurred by them in the maintenance of the portion of the road within their district, as provided by sect. 13. Justices of Lancaster *v.* Improvement Commissioners of Newton in Makerfield 416

—— Dedication—Law of Jersey - - 214
See Jersey, Law of.

—— Dedication—Market rights - - 66
See Market.

HUSBAND AND WIFE—*Divorce—Wife's Bill—Adultery coupled with Cruelty.*] The same evidence which since the Divorce Act, 1857, enables the Divorce Court to pronounce a decree for dissolution of marriage will be considered by the House of Lords sufficient ground for passing a Divorce Bill relating to Ireland, where that Act does not apply. Westropp's Divorce Bill 294

—— Legitimacy—Statements by wife - 1
See Evidence.

INDIAN LAW—*Patent Law Amendment Act*, 1852, *s.* 41—*Sufficiency of Particulars of Infringement—Practice.*] The sole object of Indian Act XV. of 1859, s. 34, corresponding with sect. 41 of the English Patent Law Amendment Act, 1852, is to give the defendant fair notice of the case which he has to meet; and it is quite immaterial whether the requisite information be given in the plaint itself or in a separate paper.—Particulars of breaches must be distinguished from particulars of objection for want of ~~novelty~~. In the latter case the particular instances may not be within the knowledge of the patentee and must be specified; in the former the defendant must know whether and in what respect he has been guilty of infringement.—Where three patents of the plaintiff all related to one article, a kiln for burning bricks, and the second and third in date were for improvements upon the invention specified in the first, and the plaintiff alleged a particular kiln constructed and used by the defendant, and in his plaint not only referred to his patents, but indicated in the case of each of them the infringements which he complained of:—*Held*, overruling the High Court, that this was a sufficient compliance with the Act.—*Talbot* v. *La Roche* (15 C. B. 310) and *Needham* v. *Oxley* (1 H. & M. 248) approved.—Appeal and suit, however, dismissed for want of jurisdiction to try it. Ledgard *v.* Bull - - - - 648

INFRINGEMENT—Particulars of—Indian law *See* Indian Law. [648

INSURANCE, FIRE—*Receipt of Premiums—Specific Appropriation.*] Where the plaintiffs being agents for an insurance office remitted to it £100 "for premiums," and it appeared that the £100 was to the knowledge of the office in excess of what they owed as agents, and that the terms on which certain lapsed policies should be renewed by the office for their benefit had been ascertained by consent:—*Held*, that although there was not in the office any specific appropriation of any part of the £100 to the payment of the premiums on the lapsed policies, yet that it must be taken to have been received on account thereof, and that from the date of receipt there was a good contract for the renewal of the old insurances. Kirkpatrick *v.* South Australian Insurance Company, Limited - - 177

INSURANCE, MARINE—*Warranty "free from average under 3 per cent."—Particular Average Loss, Mode of Ascertaining—Indemnity to Assured.*] A time policy on ship contained the warranty "free from average under 3 per cent." During a voyage covered by the policy the ship sustained (without its being discovered) a fracture of her stern-post owing to perils of the sea, being a particular average loss within the policy. The voyage having been completed and the cargo delivered the ship was put into dry dock for the purpose only of being cleaned, scraped, and painted, being in such a state that no prudent owner would have put to sea again without having her cleaned and scraped. When the ship was put into dry dock the injury was for the first time discovered, and the necessary repairs were then effected, and the ship was discharged from dry dock on the eighth day, repaired, cleaned, scraped, and painted. Had she required nothing but cleaning, scraping, and painting, she might have been discharged on the evening of the third day. The repairs alone, without cleaning, &c., would have taken the whole eight days. If the whole or half of the dock dues for the first three days ought to be charged against the underwriters in account there was a particular average loss exceeding 3 per cent. If the cost of the repairs plus the dock charges for the last five days were alone to be charged against the underwriters, there was not a particular average loss of 3 per cent. If the dock charges for the first three days ought to be attributed partly to the repairs and partly to the cleaning, &c., then (so far as the apportionment was a question of fact) it was to be taken that one half of those charges should be attributed to each purpose:—*Held*, affirming the decision of the Court of Appeal, that although a contract of marine insurance is a contract of indemnity, and though the result

INSURANCE, MARINE—*continued.*
would be that the shipowners would be relieved of part of the dock charges which they would otherwise have had to pay themselves, they were entitled to have the dock charges for the first three days apportioned between the repairs on the one hand and the cleaning, &c., on the other; that the apportionment should be one half to each purpose, and that there had therefore been a particular average loss exceeding 3 per cent. Marine Insurance Company *v.* China Transpacific Steamship Company - - - - 573

INTENTION OF STATUTE - - - 627
See Natal, Law of.

INTERDICT—Scotch Law—Nuisance - 686
See Scotch Law. 9.

INTESTATE—Real estate of—Distribution 619
See New South Wales, Law of. 3.

IRELAND—Divorce—Evidence - - 294
See Husband and Wife.

JERSEY, LAW OF—*Right of Way—Creation of Title to Servitude—Dedication followed by User.*] By the law of Jersey a public right of way in the nature of an easement over the soil of another cannot be created by a mere dedication by the owner of the fee simple at any time followed by user of the way so dedicated. *Quære*, whether an easement or servitude can be created by any enjoyment, even from time immemorial, without proof of title; and whether forty years' possession by a parish of a way as a public way accompanied by acts of ownership would prove title in the parish to either the soil or the servitude. De Carteret *v.* Baudains. De Carteret *v.* Gautier [214

JUDGMENT—Estoppel—Probate Court - 541
See Estoppel.

LANDLORD AND TENANT—Scotch law - 332
See Scotch Law. 4.

LEASE—Leave to assign - - - 332
See Scotch Law. 4.

LEGISLATIVE ASSEMBLY—New South Wales [197
See New South Wales, Law of. 2.

LEGITIM—Scotch law - - - 394
See Scotch Law. 6.

LEGITIMACY—Evidence—Statements by mother
See Evidence. [1

LIBEL—*Damages—Privilege.*] In an action to recover damages for libel it appeared that the appellants had in their newspaper falsely charged the respondent, a public officer, with specific acts of misconduct in the execution of the duties of his office, had vouched the truth of those charges, and, on the assumption of their truth, commented on his proceedings in highly offensive and injurious language:—*Held*, that they were liable. The privilege which covers fair and accurate reports of proceedings in parliament and in courts of justice does not extend to fair and accurate reports of statements made to the editors of newspapers. Davis *v.* Shepstone - - - - 187

LIEN—Maritime - - - - 270
See Ship.

LIMITATIONS, STATUTE OF—(21 *Jac. c.* 16—*Cause of Action—Damages, recovery of for Injury after Satisfaction for previous Injury arising from same Act—Support—Action for Subsidence after Compensation for previous Subsidence.*] Lessees of coal under the respondent's land worked the coal so as to cause a subsidence of the land and injury to houses thereon in 1868. For the injury thus caused the lessees made compensation. They worked no more, but in 1882 a further subsidence took place causing further injury. There would have been no further subsidence if an adjoining owner had not worked his coal, or if the lessees had left enough support under the respondent's land:—*Held*, affirming the decision of the Court of Appeal, Lord Blackburn dissenting, that the cause of action in respect of the further subsidence did not arise till that subsidence occurred, and that the respondent could maintain an action for the injury thereby caused, although more than six years had passed since the last working by the lessees.—*Nicklin* v. *Williams* (10 Ex. 259) and *Backhouse* v. *Bonomi* (E. B. & E. 622; 9 H. L. C. 503) discussed. *Lamb* v. *Walker* (3 Q. B. D. 389) overruled. Darley Main Colliery Company *v.* Mitchell - - - 127

—— Mortgage—Payments of interest - 639
See Canadian Law. 1.

LIQUIDATED DAMAGES—Scotch law - 332
See Scotch Law. 4.

LOCAL GOVERNMENT ACTS—*Paving of Streets—Notice to pave in a specified Manner—Validity of Notice—Public Health Act*, 1875 (38 *& 39 Vict. c.* 55) *s.* 150.] Under s. 150 of the Public Health Act 1875 (38 & 39 Vict. c. 55) an urban sanitary authority gave notice to the owner of premises to pave part of a street upon which his premises abutted, specifying the materials and mode and (inter alia) requiring him to lay down concrete. The owner having failed to comply, the sanitary authority did the work themselves, but finding that the concrete would be an unnecessary expense, omitted it:—*Held*, that the omission to follow strictly the terms of their own notice did not prevent the sanitary authority from recovering from the owner his proportion of the expenses incurred. Local Board for Acton *v.* Lewsey [93

LOST WILL—Probate - - - 469
See Probate.

LOWER CANADA - - - - 157
See Canadian Law. 2.

MALICIOUS PROSECUTION—*Reasonable and probable Cause—Honest Belief of Prosecutor—Burden of Proof—Corporation—Action for Malicious Prosecution against Corporation.*] In an action against a railway company for malicious prosecution the judge directed the jury that it was for the plaintiff to establish a want of reasonable and probable cause, and malice, and that it lay on him to shew that the defendants had not taken reasonable care to inform themselves of the true facts of the case, and asked the jury whether they were satisfied that the defendants did take reasonable care to inform themselves of the true facts, and that they honestly believed in the case which they laid before the magistrates. The

MALICIOUS PROSECUTION—*continued.*
jury answered both questions in the affirmative, and the judge entered judgment for the defendants:—*Held*, affirming the decision of the Court of Appeal (11 Q. B. D. 440), that the direction was right, and the judgment rightly entered.—*Held*, also, by Lord Bramwell, that an action for malicious prosecution does not lie against a corporation aggregate, a corporation aggregate being incapable of malice or motive. Abrath *v.* North Eastern Railway Company [247

MARINE INSURANCE - - - 573
See Insurance, Marine.

MARITIME LIEN - - - - 270
See Ship.

MARKET—*Grant of "in sive juxta"—Market, Extension of—Dedication of Streets subject to Market Rights—Highway, Dedication of subject to Market rights.*] By letters patent in 34 Charles II. the king granted market rights "in sive juxta" a certain place called "Spittle Square" to one who was lessee of the square and had acquired the greater part of the reversionary interest in it. The grantee or his successors in title laid out the square as a market place with four internal streets. The land immediately surrounding the square was afterwards laid out in four external streets, but it did not appear to whom the property in this surrounding land at any time belonged. There was evidence of a usage from the time of living memory to grant licenses and take tolls for the sale of marketable articles over parts of the external streets as well as over the market place and the internal streets:—*Held*, affirming the decision of the Court of Appeal, that under the grant "in sive juxta" the market rights extended into the four external streets as well as over the market place and the four internal streets; and that the inference from the documents and evidence was that the streets were dedicated to the public subject to the exercise of the market rights.—*Quære*, how far a grant "in or near" a place can lawfully extend. Attorney-General *v.* Horner - - - - - 66

—— Scotch law—Powers of corporation - 665
See Scotch Law. 5.

MATERIAL MAN - - - - 270
See Ship.

MAXIM OF LAW—Actio personalis moritur cum personâ - - - 466
See Trespass.

—— Qui prior est tempore potior est jure 20
See Company.

METROPOLIS MANAGEMENT ACTS—*Metropolis Management Amendment Act* 1862 (25 & 26 *Vict. c.* 102) *ss.* 74, 75—*General Line of Buildings—Certificate of Superintending Architect—House at Corner of two Streets—Order of Magistrate—Reduction into writing—Time of Service.*] The appellants' house was built at the corner of the K. Road and a new street called D. Gardens. The side of the house abutting on the eastern side of D. Gardens projected beyond a row of houses on that side of D. Gardens. Under sect. 75 of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102) the superintending architect to the Metropolitan Board of Works gave a certificate that the main fronts of that row of houses was the general line of buildings on the eastern side of D. Gardens, but did not decide that that was the general line of buildings, either of the row of houses or of the street in which the appellants' house was situate:—*Held*, reversing the decision of the Court of Appeal, that no offence under sect. 75 had been committed by the building of the appellants' house, and that there was no jurisdiction for a magistrate's order under that section directing the demolition of the projecting part of the house.—A magistrate made a verbal order under sect. 75 directing the builder to demolish part of a house within eight weeks. The builder was present when the order was made, but it was not reduced into writing till the day when the eight weeks expired; after that day a copy was served upon him or came to his knowledge:—*Held*, reversing the decision of the Court of Appeal, that the order was not "an order in writing made on" the builder within the meaning of sect. 75, and was therefore invalid. Barlow *v.* Vestry of St. Mary Abbotts, Kensington - - 257

MISREPRESENTATION - - - 232
See False Representation.

MISTAKE—*Payment of Money by Mistake—Liability to refund—Privity.*] The plaintiff bank being under instructions from R. to remit his moneys to a bank at Halifax, through the mistake of its agents paid them to a New York bank for transmission to the defendants, who on being advised thereof debited the N. Y. bank, and credited R. in account with the amount thereof, and being afterwards advised of the mistake claimed to retain and use the moneys in reduction of R.'s account with them:—*Held*, that on being advised of the mistake the defendants were bound to repair it, and that the plaintiff bank had a sufficient interest in the moneys to recover them as moneys received to their use. Colonial Bank *v.* Exchange Bank of Yarmouth, Nova Scotia [84

MORTGAGE—Banking company—New South Wales - - - - 192
See New South Wales, Law of. 1.

NATAL, LAW OF—*Construction of Statute—Intention of a Statute—Operative Words—Surplusage rejected.*] Where the main object and intention of a statute are clear it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of law, except in the case of necessity or the absolute intractability of the language used.—The clearly expressed intention of Natal Ordinance No. 1 of 1856 was to give to any subject of the Queen resident in Natal the power of disposing by will according to English law of property both real and personal, which otherwise would devolve according to Natal law. Sect. 1 was operative for that purpose except that it concluded with the provision "as if such subject resided in England," the effect of which is to leave both the lex situs and the lex domicilii in operation, thus reducing the section to a nullity:—*Held*, that these words ought not to be so con-

NATAL, LAW OF—*continued.*
strued as to destroy all that has gone before, and therefore should be treated as immaterial, the powers conferred not being affected by the question of residence in England. SALMON *v.* DUNCOMBE - - - - - - 627

NECESSARIES FOR SHIP - - - 270
See SHIP.

NEW BRUNSWICK, LAW OF - - 639
See CANADIAN LAW. 1.

NEW SOUTH WALES, LAW OF—*Bank incorporating Acts—Construction—Foreclosure.*] *Held*, that there was nothing in its incorporating Acts which took away from the appellant bank the power of foreclosing, the mortgage in suit having been legally and properly taken by the bank, and in terms involving foreclosure.—The statutory provision that the bank should hold any security which it had taken "for the purpose of reimbursement only and not for profit," could not take away the power to foreclose expressly attached by statute to the mortgage. BANK OF NEW SOUTH WALES *v.* CAMPBELL - - - - 192

2. —— *Legislative Assembly—Power of Suspension—Action of Trespass—Pleas and Justification.*] The respondent having entered the chamber of the New South Wales Assembly, of which he was a member, within a week after it had passed a resolution that he be "suspended from the service of the House," he was removed therefrom and prevented from re-entering it:—*Held*, in an action of trespass, that the resolution must not be construed as operating beyond the sitting during which the resolution was passed.—*Held*, further, that the standing order of the Legislative Assembly adopting so far as is applicable to its proceedings the rules, forms, and usages in force in the British House of Commons, and assented to by the Governor, was valid, but must be construed to relate only to such rules, forms, and usages as were in existence at the date of the order.—The powers incident to or inherent in a Colonial Legislative Assembly are "such as are necessary to the existence of such a body and the proper exercise of the functions which it is intended to execute," and do not extend to justify punitive action, or unconditional suspension of a member during the pleasure of the Assembly.—*Doyle* v. *Falconer* (Law Rep. 1 P. C. 328) approved. BARTON *v.* TAYLOR - - - - - - 197

3. —— *Real Estate of Intestates Distribution Act*, 1862.] The intention of the New South Wales Real Estate of Intestates Distribution Act, 1862, was to introduce a new rule of succession to real estate, and to enact that in cases of intestacy it should be administered and should devolve precisely as chattels real did before:—*Held*, reversing the decision of the Supreme Court, that such rule applies to all cases, and not merely to those cases in which the dead owner has actually left an heir. WENTWORTH *v.* HUMPHREY 619

NEW TRIAL - - - - 152, 604
See PRACTICE. 1, 4.

NOTICE—Mortgage of shares - - 20
See COMPANY.

—— Paving of street - - - 93
See LOCAL GOVERNMENT ACTS.

NUISANCE—Railway company—Cattle traffic 45
See RAILWAY COMPANY. 2.

—— Scotch law—Interdict - - - 686
See SCOTCH LAW. 9.

OFFICIAL RECEIVER—Bankruptcy - 286
See BANKRUPTCY. 1.

OPERATIVE WORDS—Construction of statute
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ORDER AND DISPOSITION - - 426
See BANKRUPTCY. 2.

PARTICULARS OF INFRINGEMENT—Indian law - - - - - 648
See INDIAN LAW.

PARTNERSHIP—*Expiration of Term—Business continued without fresh Articles—Operation of old Articles—Partnership-at-Will—Right of each Partner instantly to determine the Partnership.*] When the members of a mercantile firm continue to trade as partners after the expiration of the term limited by the partnership articles, without making any new agreement, the original contract is prolonged by tacit consent, and all its conditions remain in force, except in so far as they are inconsistent with any implied term of the renewed contract. An implied term of such a new contract is that each partner has the right, when acting bonâ fide and not for the purpose of obtaining an undue advantage, instantly to determine the partnership.—A clause of a contract of copartnership provided, inter alia, that "If three months before the termination of this contract, the whole partners of the company shall not have agreed to carry on the business thereof, any one or more of them who may be desirous of retiring shall be entitled to do so, and shall immediately, on the completion of the balance after-mentioned, be paid out, by the partners electing to continue the business, his share in the concern, as the same shall be ascertained by a balance of the company's books, as at the termination of the contract to be completed, within not more than three months from said termination; . . . . but if the whole partners wish, the property and assets of the copartnery shall be disposed of as follows:—It shall be competent for any one of the partners, for himself or for any one or more of them together, to give in offers for the same as a going concern, and the highest offerer is to be held to be the purchaser; and in case only one offer was made, the party making it was to be the purchaser, at such a price as shall be mutually agreed, and in case no offer was made, then the said property and assets shall be realised in such manner as shall be mutually agreed upon, or as shall be fixed by the arbiter named." The business was carried on after the term limited by the contract of copartnery had expired without any new agreement:—*Held*, reversing the decision of the Court below, that this clause had no longer any application; and that each partner was at liberty to determine the whole partnership whenever he thought proper. NEILSON *v.* MOSSEND IRON COMPANY - 298

PATENT—Infringement—Particulars—Indian Law - - - - - 648
See INDIAN LAW.

PAYMENT—Appropriation of - - 177
See Insurance, Fire.

—— By mistake - - - - 84
See Mistake.

PENALTY—Liquidated - - - 332
See Scotch Law. 4.

PETITION OF RIGHT—*Damages for Breach of Contract by the Crown.*] It is settled law that a petition of right will lie for damages resulting from a breach of contract by the Crown.—*Thomas* v. *The Queen* (Law Rep. 10 Q. B. 31) and *Feather* v. *The Queen* (6 B. & S. 293) approved.—It is immaterial whether the breach is occasioned by the acts or by the omissions of the Crown officials. Windsor and Annapolis Railway Company *v.* The Queen - - - - - 607

POWER TO SELL—Official receiver—Bankruptcy
See Bankruptcy. 1. [286

PRACTICE—*Appeal—Right to appeal—Appellant's Remedy in the Court below.*] Where a defendant objected to a verdict on the ground that it was not warranted by the evidence, but neglected to move the Court for a new trial in the manner directed by the rules and practice of the Court:—*Held*, that Her Majesty in Council could not alter the verdict, or set it aside, and could not be advised to direct a new trial, the appellant not having applied in that behalf to the Court in the regular course. Dagnino *v.* Bellotti - 604

2. —— *Appeal—Leave to appeal.*] Where by special agreement sanctioned by the Court the petitioner had come in and consented to be made a party to the cause in appeal, and to be bound by the order of the Supreme Court to be made therein, but by the terms of the agreement the powers of the Supreme Court were defined and restricted, and its order to be "considered a final disposition of all contentions whether now in litigation or not":—*Held*, that the Supreme Court in deciding the case was acting under the terms of a special reference and not in its ordinary jurisdiction as a Court of Appeal.—Special leave to appeal refused. Attorney-General of Nova Scotia *v.* Gregory - - - - 229

3. —— *Evidence—Cross-examination on Affidavit—Witness out of Jurisdiction—Rules of Supreme Court*, 1883, *Order xxxvii. rr.* 1, 5, 21, 22; *Order xxxviii. rr.* 21, 28.] On the prosecution of an inquiry added to a decree one party filed an affidavit by a person resident in South America, and gave notice to read it, whereupon the opposite party gave notice that he required to cross-examine the deponent, not saying when, where, or before whom:—*Held*, affirming the decision of the Court of Appeal (32 Ch. D. 133), that Order xxxviii. r. 28, excluding an affidavit from being read, except by special leave, unless the deponent is produced for cross-examination—even supposing that Order xxxvii., rr. 21, 22, make that rule applicable to evidence on an inquiry, and supposing that Order xxxviii., r. 28, applies to a witness resident out of the jurisdiction—did not exclude the present affidavit, as the notice for cross-examination did not follow the terms of Order xxxviii., r. 28:—*Held* also, that the order of the Court of Appeal admitting the affidavit as evidence, without prejudice to any application by

PRACTICE—*continued.*
the opposite party within fourteen days for the cross-examination of the deponent in any place in South America before some proper person to be appointed for that purpose, was right under all the circumstances. Concha *v.* Concha - 541

4. —— *New Trial—Verdict against Evidence—Principle on which New Trial allowed.*] A new trial ought not to be granted on the ground that the verdict of the jury was against the weight of the evidence, unless the verdict was one which a jury, viewing the whole of the evidence reasonably, could not properly find.—Observations by Lord Halsbury on *Solomon* v. *Bitton* (8 Q. B. D. 176). Metropolitan Railway Company *v.* Wright [152

5. —— *Rehearing.*] In a petition for rehearing of two appeals which had been fully heard upon their merits, and in which judgment had been given and reported to Her Majesty, and confirmed by regular orders in Council:—*Held*, that assuming that a relevant case of new matter had been made out the decision was final, and the petition must be refused.—There may be exceptional circumstances which will warrant this Board, even after an order of Her Majesty in Council has been made, in allowing a rehearing at the instance of one of the parties; but this is an indulgence with a view mainly to doing justice when by some accident, without blame, the party has not been heard and an order has been made inadvertently as if the party had been heard. *Rajunder Narain Rae* v. *Bajai Govind Sing* (2 Moore's Ind. Ap. Ca. 220; S. C. 1 Moore's P. C. 117) referred to. Venkata Narasimha Appa Row *v.* The Court of Wards. Venkata Ramalakshmi Garu *v.* Gopala Appa Row 660

—— Patent suit—Indian law - - 648
See Indian Law.

—— Scotch law—Appeal from inferior Court—Question of fact in law - - 686
See Scotch Law. 9.

PRESCRIPTION—Repair of sea wall - 449
See Sea Wall.

PRINCIPAL AND SURETY—*Liability of Surety.*] The appellants having become sureties on the faith of a mortgage granted by the principal debtor to his creditor, claimed to be released wholly or pro tanto from liability, on the ground that the creditor had without notice to them sold parts of the mortgaged property in a manner unwarranted by the terms of the mortgage deed, and that inasmuch as the purchaser had failed to pay the price, they had been deprived of the benefit of a security upon which they were entitled to rely for protection:—*Held*, that on the evidence the sale was effected by the mortgagor, although with the previous consent of the mortgagee, in the due course of his management and in a manner contemplated by the mortgage deed, and that the liability of the sureties was not affected thereby. Taylor *v.* Bank of New South Wales - - - - - - 596

PRIORITY—Mortgage of shares - - 20
See Company.

—— Registered title—South Australia - 171
See South Australia, Law of.

PRIVILEGE—Libel - - - - 187
See Libel.

PRIVITY—Money lent by mistake - 84
See Mistake.

PRIVY COUNCIL—Practice - - 229, 604, 660
See Practice. 1, 2, 5.

PROBATE—*Lost Will—Evidence of Contents of lost Will—Parol Evidence—Declarations by Testator of Contents of lost Will.*] If a lost will is propounded for probate upon parol evidence alone, with evidence of a residuary bequest, but no sufficient evidence as to the rest of the will:—*Quære*, whether probate ought to be granted of the residuary bequest alone, unless the Court is satisfied that it has before it substantially the testamentary intentions of the testator. *Quære*, also, whether post-testamentary declarations of the testator as to the contents are admissible in evidence. *Sugden* v. *Lord St. Leonards* (1 P. D. 154) commented on. Woodward *v.* Goulstone - 469

PROBATE COURT—Judgment of—Estoppel—Res judicata - - - - 541
See Estoppel.

PUBLIC HEALTH ACT - - - 93
See Local Government Acts.

RAILWAY COMPANY — *Carrier — Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20) *s.* 90; "*Passing only over the same portion of the line;*" "*Under the same circumstances*"—*Tolls, Unequal—Group Rates—Undue Preference—Railway and Canal Traffic Act* 1854 (17 & 18 *Vict. c.* 31) *ss.* 2, 3, 6—*Action for Breach of Railway and Canal Traffic Act* 1854, *s.* 2, *whether maintainable.*] The provision in sect. 90 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), requiring equality of rates for carriage of goods "passing only over the same portion of the line of railway under the same circumstances," applies only to goods passing between the same points of departure and arrival, and passing over no other part of the line. And mere inequality in the rate of charge when unequal distances are traversed does not constitute a preference inconsistent with the concluding words of that section. Therefore, where a railway company carried coals from a group of collieries situate at different points along their line, and charged all the collieries with one uniform set of rates in respect of such carriage, and the owners of the colliery lying nearest to the point of arrival brought an action for overcharges:—*Held*, affirming in this respect the decision of the Court of Appeal, that the railway company had not infringed the provisions of sect. 90 of the Railways Clauses Consolidation Act 1845:—*Held*, also, that in this case an action did not lie for breach of s. 2 of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), undue or unreasonable preference or prejudice not having been made out.—*Quære*, whether under any circumstances an action lies for breach of that section.—Where goods are carried for different customers "over the same portion of the line of railway," the fact that the goods carried for one customer are to be shipped to certain ports in order to develop a new trade, or open up new markets, and so to increase the tonnage carried, does not constitute a difference in the "circumstances" so as to justify inequality of rates.—Therefore, where a railway company carried coals over the same portion only of the line to G., both for the appellants and also for B., and allowed B. 8*d.* per ton in respect of all coal carried to G., and there shipped for the West Indian market; and also allowed B. 6*d.* per ton in respect of all coal carried to G., and there shipped by him to certain ports, in consideration of bonâ fide undertaking by B. to develop the trade to those ports, to provide the vessels, and to run the risks incidental to the working of such a traffic:—*Held*, affirming in this respect the decision of the Court of Appeal, that the coals were carried "under the same circumstances," and that the allowances were breaches of sect. 90 of the Railways Clauses Consolidation Act 1845:—*Held* also, reversing in this respect the decision of the Court of Appeal, that the appellants were entitled to recover the overcharges by action against the company, the amount to be ascertained by finding what quantity of coal carried under the same circumstances and over the same portion only of the line was charged at the higher rate to the appellants at the time the lower rate was charged to B.—A railway company which carried coals for the appellants and also for B. and J. "over the same portion of their line of railway," and made allowances and a rebate to B. and J., proved that they carried for B. and J. at a less cost to the company, but did not shew that the allowances and rebate were adequately represented by the saving to the company:—*Held*, affirming in this respect the decision of the Court of Appeal, that the difference in cost constituted a real difference in the "circumstances"; that there being nothing to shew any want of good faith the company were not bound to prove that the allowances and rebate were adequately represented by the saving; that there was no breach of sect. 90 of the Railways Consolidation Act 1845; and that the appellants could not maintain an action under that section. Denaby Main Colliery Company *v.* Manchester, Sheffield, and Lincolnshire Railway Company 97

2. —— *Power to purchase by Agreement additional Lands—Nuisance authorized by Statute—Cattle Traffic.*] A railway company were by their Act authorized among other things to carry cattle, and also to purchase by agreement (in addition to the lands which they were empowered to purchase compulsorily) any lands not exceeding in the whole fifty acres, in such places as should be deemed eligible, for the purpose of providing additional stations, yards, and other conveniences for receiving, loading, or keeping any cattle, goods, or things conveyed or intended to be conveyed by the railway, or for making convenient roads or ways thereto, or for any other purposes connected with the undertaking which the company should judge requisite. The company were also empowered to sell such additional lands and to purchase in lieu thereof other lands which they should deem more eligible for the aforesaid purposes, and so on from time to time. The Act contained no provision for compensation in respect of lands so purchased by agreement.—Under this power the company some years after the expiration of

RAILWAY COMPANY—*continued.*
the compulsory powers bought land adjoining one of their stations and used it as a yard or dock for their cattle traffic. To the occupiers of houses near the station the noise of the cattle and drovers was a nuisance which, but for the Act, would have been actionable. There was no negligence in the mode in which the company conducted the business:—*Held*, reversing the decisions of the Court of Appeal and of North J., that the purpose for which the land was acquired being expressly authorized by the Act, and being incidental and necessary to the authorized use of the railway for the cattle traffic, the company were authorized to do what they did, and were not bound to choose a site more convenient to other persons; and that the adjoining occupiers were not entitled to an injunction to restrain the company.—*Metropolitan Asylum District* v. *Hill* (6 App. Cas. 193) distinguished. London, Brighton, and South Coast Railway Company *v.* Truman [45

—— Scotland - - - - - 386
See Scotch Law. 7.

RATES—Inequality—Railway company - 386
See Scotch Law. 7.

REASONABLE CAUSE—Malicious prosecution
See Malicious Prosecution. [247

RECEIVER—Official—Bankruptcy - 286
See Bankruptcy. 1.

REGISTRATION—South Australia—Priority 171
See South Australia, Law of.

REHEARING—Privy Council - - 660
See Practice. 5.

RENTER—Beach of river—Land regulations of China Settlements - - - 180
See China Settlements, Law of.

REPAIR OF BRIDGE—Scotch law - 699
See Scotch Law. 2.

REPUTED OWNERSHIP - - - 426
See Bankruptcy. 2.

RES JUDICATA - - - - 541
See Practice. 3.

RULES OF SUPREME COURT, 1883, Order XXXVII., rr. 1, 5, 21, 22 - - 541
See Practice. 3.

—— **Order XXXVIII., rr. 21, 28** - - 541
See Estoppel.

SALE BY COURT—Misrepresentation - 232
See False Representation.

SALE OF GOODS—Scotch Law - - 350
See Scotch Law. 8.

SCOTCH LAW—*Building Society—Winding-up—Borrowing Members and Losses inter se*—6 & 7 *Will.* 4, *c.* 32.] The rules of a benefit building society provided that borrowing members who had given heritable securities for an advance could redeem their bonds either by (1) giving three months' notice that they renounced their shares, and paying the amount of the advance under deduction of instalments paid and interest thereon; or (2) by payment of the whole sum borrowed, retaining their shares; and that when the subscriptions with the share of profits of such members were equal to the amount advanced, then their payments and connection with the society were to cease.—In 1884, losses having occurred, the society was ordered by the Court to be wound up. There were no outside creditors:—*Held*, reversing the decision of the Court below, that the case was governed by *Brownlie* v. *Russell* (8 App. Cas. 235), and that the borrowing members were entitled to have their securities discharged in the terms of the rules, and were not bound to remain members and bear a share of the losses incurred by the society. Tosh *v.* North British Building Society - - - 489

SCOTCH LAW—*continued.*
2. —— *Bridge—Liability for Maintenance—Bridge partly in one County and partly in another—Roads and Bridges (Scotland) Act*, 1878 (41 & 42 *Vict. c.* 51), *ss.* 37 *and* 38—13 *Vict. c.* 21, *s.* 4.] By the Roads and Bridges (Scotland) Act, 1878, sect. 88, after reciting that "there are or may be bridges in Scotland which accommodate, or may accommodate, the traffic, not only of the county or counties, or burgh or burghs, as the case may be, within which they are locally situated, but also of the adjoining county, or of other counties, and burgh or burghs, or one or more of them, and it is not reasonable that the whole burden of managing, maintaining, repairing, and if need be, rebuilding such bridges, and of paying the debt affecting, or which may affect the same, should be imposed upon the county or burgh within which they are so situated," provision is made for proceedings whereby the localities in which bridges are situate may be relieved of part of the expense of maintaining them where they accommodate the traffic of other localities:—*Held*, affirming the decision of the Court below, that the provisions of the section are applicable to bridges locally situate in more than one county or burgh. Provost of Glasgow *v.* Police Commissioners of Hillhead - - - 699

3. —— *Charitable Trust—Commingling of different Funds—Excess of Expenditure over Income—Personal Liability of Trustees—Discretion of the Court—Practice.*] Pursuers in an actio popularis in re a public trust have no right to demand a partial decree, which will leave unsettled matters seriously affecting the future administration of the charity.—If trustees of a public charitable trust cannot carry out the main purpose of the trust in the mode the truster has expressed, it is their duty to apply to the Court for directions.—When capital of one trust fund is bonâ fide intermixed by the same trustees with capital of another trust fund, both funds being bequeathed for the same public charity, and an actio popularis is brought, the duty of the Court is to consider what course is best—looking at the whole circumstances—for the interest of the charity; and the Court ought to refuse to give any decision until the whole circumstances to form such final decision is before them, it being within the power of the Court to order either an independent inquiry or the production of further evidence by the parties.—In 1859 James E. left certain sums to A. and B. to found a ragged school in N. S. A. and B. built the school. In 1863 John E. a brother of James E., died, having directed his trustees to hand over to A. and B., as James E.'s trustees, the sum of £7000, and directed that if A. and B.

were satisfied the ragged school was sufficiently provided for, they should build and fit up—specifying £500 as the cost—another school adjoining the ragged school, "*in the same style of architecture*," and apply the surplus in maintaining the school as one for middle-class education, the two schools to be called the "E. Institute." In 1866 A. E., sister of the above, died, and by her will left the residue of her estate, about £3000, to A. and B., as James E.'s trustees, to be invested, the interest to be applied annually by A. and B. towards the support and maintenance of the ragged school; and should they consider that the funds left by James E. are sufficient for that purpose, to apply the whole or any part of the annual interest in support of the contemplated school for affording superior education. At the time of this last legacy A. and B. had erected and nearly completed the school for superior education, but the accounts had not been all paid, the cost much exceeding £500. The bulk of John E.'s legacy, namely £5500, had been invested on deposit note at 4½ per cent., and payment on account of the new building had been met by overdrafts on the bank. On receipt of A. E.'s legacy A. and B. paid these overdrafts by that legacy.—D. and C. raised this action on the part of the public to have A. and B. declared personally liable to replace on investment A. E.'s £3000. A. and B. pleaded that they had considered all these legacies as forming *one endowment* for the "E. Institute," and no separation was made in the accounts; and that the £3000 was represented by an aliquot part of the £5500 on deposit. It was proved that A. and B. had acted bonâ fide, had not spent more than was necessary on the new building, and that they had handed over the £5500 to the new managers of the school. The Lord Ordinary held A. and B. bound to invest the money. The Second Division recalled that judgment, and dismissed the action simpliciter:—*Held*, reversing the decision of the Court below, except as to the recall of the Lord Ordinary's judgment, that A. and B. were entitled to absolvitor as far as the action was directed against them individually; but, secondly, that there not being sufficient evidence before the House, the case must go back to the Court below to determine whether the encroachments which have been made on the capital either of John E.'s or A. E.'s bequest ought to be repaid, or any, and if so to what extent, by accumulation of future income:—*Held*, also, that the fact that John E.'s funds were in other hands ought not to form any impediment to these matters being inquired into. Andrews *v.* M'Guffog - - - 313

4. —— *Landlord and Tenant—Assent of Landlord to assign Lease—Penalties, penal and liquidated—Unassignable Lease—Contingent Damage—Company—Winding-up—Creditor in Liquidation entitled to interdict Dispersion of Assets.*] When a lease is not assignable without the landlord's assent, the fact that the landlord did not object to the assignees taking possession cannot, irrespective of all other circumstances, be held sufficient to imply his recognition of the assignees. When one lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal and subject to modification; but where the payments stipulated are made proportionate to the extent to which the contractors may fail to implement their obligations, and they are to bear interest from the date of the failure, payments so adjusted with reference to the actual damage are liquidated damages.—Lessees, who had been granted the privilege of placing slag from blast furnaces on land let to them, covenanted (inter alia) to pay the lessor £100 per imperial acre for all land not restored at a particular date:—*Held*, reversing the decision of the Court below, that the sum, although described in one part of the agreement, as "the penalty therein stipulated" was not a penalty; but estimated or stipulated damages.—When a limited company is voluntarily wound up a lessor who has granted a lease to the company not assignable without his consent, may obtain an interdict against the liquidator of the company dividing the surplus among the shareholders until some provision to meet his future contingent claims against the company is made. Lord Elphinstone *v.* Monkland Iron and Coal Company - - - - - - 332

5. —— *Market—Edinburgh Market Act* (37 & 38 *Vict. c. lxxxv. s.* 8)*—Power of Corporation to let covered Portion of Market for other Purposes.*] By 37 & 38 Vict. c. lxxxv., s. 8, the corporation of Edinburgh (who were grantees of a market in Edinburgh) "may use in a suitable and convenient manner the fruit and vegetable market place, and improve and better adapt the same for the purposes of such market, and for the accommodation of parties using the same, and of the public, &c. Provided always that the ground floor only of such market place shall be used for such fruit and vegetable market, and that all vacant portions of such market place, whether on the ground floor or above the same, and all vacant and unlet stands, stalls, or shops in or on such market place may be let or used by the corporation for such purposes and for such rents or sales as to them shall seem proper":—*Held*, affirming the decision of the Court below, that the corporation were not entitled to exclude members of the public from the covered portion of the market during market hours and devote the building to other purposes.—*Per* Lord Watson: When a grant of market is not confined to any particular locality, the grantee may, from time to time change the site in order to suit his own convenience; but it is an implied condition of the exclusive privilege that he shall provide a market place, and that implied condition is satisfied so long as he gives reasonable accommodation to those members of the public who use the market either as buyers or sellers, and the extent of the accommodation which must be afforded in each case must vary with the circumstances. Magistrates of Edinburgh *v.* Blackie - - - - 665

6. —— *Parent and Child—Entailed Estates—Legitim—Exclusion of Apparent Heir in Antenuptial Contract of Marriage—5 Geo. 4, c. 87, ss. 4, 5; 11 & 12 Vict. c. 36, s. 32—Acquiescence.*] Although the right of children may be barred or

SCOTCH LAW—*continued.*
excluded altogether, either by direct renunciation between their father and them, or by an express exclusion of their right in the ante-nuptial contract of their parents, yet their right cannot be barred by inference or implication.—By ante-nuptial contract of marriage between the settlor, the heir in possession of entailed estates and his intended wife, dated 1851, the settlor, after reciting sect. 4 of the Aberdeen Act (5 Geo. 4, c. 87), granted provisions in favour of the children of the marriage, other than and excluding the heir who should succeed to the entailed estates; he also appointed tutors to the children, and, inter alia, gave directions as to the maintenance and education of the heir as well as the other children, "which provisions before conceived in favour of the children of the marriage are hereby declared to be in full satisfaction to them of all bairns' part of gear, legitim, portions natural:" &c.—*Held*, affirming the decision of the Court below, that the claim of the eldest son and child of the marriage who succeeded to the entailed estates to legitim was not barred by the marriage contract.—A son remained in ignorance of his right to legitim for nearly three years after his father's death: and all parties acted as if legitim was not due.—*Held*, the son's claim to legitim was not barred by acquiescence. Countess Dowager of Kintore *v.* Earl of Kintore - - 394

7. —— *Railway—Unequal Rates—Agreement to reduce—"Lower Rates"—Meaning of.*] A railway company agreed with A. & B., coalowners, that they would carry their coal, subject to clause 11, at certain charges given in the schedule; and they also agreed (clause 9) that in the event of their charging any other trader for the same description of traffic lower rates than those stipulated to any station, then in that event A. & B. were to have a corresponding reduction in the rates payable by them to such station. Clause 11 was to the effect that notwithstanding the rates or charges before specified, they were entitled to charge A. & B. rates or charges similar to those charged and paid by the Eglinton Coal Company; and in the event of any consideration being given to the Eglinton Company for raising them, a similar consideration shall be given to A. & B. The railway company charged D. another coal-owner, not a party to the agreement, a lower rate per ton, taking into account the greater distance the coal was carried. The agreement with the Eglinton Company was not in evidence. It was alleged the rate charged A. & B. was not higher than that charged to the Eglinton Company:—*Held*, affirming the decision of the Court below, that there was nothing in clause 11 to supersede the effect to clause 9, and that upon the true construction of the latter clause, A. & B. were entitled to a corresponding reduction with D., and repayment of over-charges; "lower rates" meaning proportionately lower rates per ton per mile, and not a less sum per ton irrespective of the distance carried. Glasgow and South Western Railway Company *v.* Mackinnon - - 386

8. —— *Sale of Goods—Bankruptcy of Manufacturer—Right of Trustee to Articles in course of manufacture—Mercantile Law Amendment (Scotland) Act, s. 1.*] The Mercantile Law Amendment (Scotland) Act (19 & 20 Vict. c. 60), s. 1—which provides that, "Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belong to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing the delivery of the same"—imposes no limitation upon the right of the seller's creditor or trustee until the contract of sale is so far completed as to confer a proper jus ad rem upon the purchaser.—By Lord Watson: The same circumstances which in England sustain the inference that a chattel has been "sold" to the effect of passing its property to the vendee, will, in Scotland, generally be sufficient to give him a jus ad rem under 19 & 20 Vict. c. 60, s. 1.—*Woods* v. *Russell* (except as to the rudder and cordage) (5 B. & Al. 942); *Clarke* v. *Spence* (4 Ad. & E. 448); *Wood* v. *Bell* (5 E. & B. 772, and 6 E. & B. 355)) approved.—The principles applicable to the sale of part of a ship are equally applicable to the sale of part of any corpus manufactum in course of construction. And it follows that it is competent for parties to agree for a valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has reached a certain stage; but it is a question of construction in each case at what stage the property shall pass; and a question of fact whether that stage has been reached.—On the other hand, materials provided by the builders as portions of the fabrics, whether wholly or partially finished, cannot be regarded as appropriated to the contract, or as "sold," unless they have been "affixed," or in a reasonable sense made part of the corpus. *Wood* v. *Bell* (6 E. & B. 355) and *Tripp* v. *Armitage* (4 M. & W. 687) approved. Seath *v.* Moore - - 350

9. —— *Practice—Appeal—Inferior Court—Scottish Judicature Act*, 1825 (6 *Geo.* 4, *c.* 120), *s.* 40—*Question of Fact or Law—Interdict—Nuisance.*] Sect. 40 of the 6 Geo. 4, c. 120, provides that where a cause is commenced in the Sheriff Court or other Inferior Court, and a proof is allowed, the judgment shall be subject to appeal to the House of Lords in so far only as the same depends on or is affected by matter of law.—An action was raised in the Sheriff Court for declarator that the burning of certain heaps of mineral refuse would cause serious nuisance and annoyance to the proprietors of adjacent residential houses. On appeal to the Court of Session, that Court found that the ignition of the heaps "would cause material discomfort and annoyance:"—*Held*, that this finding was not upon a question of law, and therefore not the subject of appeal.—The words of an interdict or injunction against causing a nuisance ought not to be so drawn as to shut out all scientific attempts to attain the desired end without causing a nuisance. Fleming *v.* Hislop - - - - - 686

SEA WALL—*Prescription, Liability by, of Frontager to repair Sea Wall—Extraordinary Violence of the Sea—Act of God—Commissioners of Sewers, Order by, to repair Sea Wall—Presentment of Jury*

SEA WALL—*continued.*
of Liability of Frontager—3 & 4 *Will.* 4 *c.* 22 *s.* 13—*Land Drainage Act.* 1861 (24 & 25 *Vict. c.* 133) *s.* 33—*Disqualification of Commissioner by reason of Interest*—23 *Hen.* 8 *c.* 5—13 *Eliz. c.* 9.] A. was a frontager in a level on the Essex shore of the Thames under the jurisdiction of commissioners of sewers. An ancient sea wall protected the level against incursions of the sea. There was evidence proving a prescriptive liability on the frontagers in the level to maintain and repair the portions of this wall respectively fronting their lands. Part of the wall in front of A.'s land was destroyed by an extraordinary storm and high tide. This part of the wall was previously in good repair and in a proper condition to resist the flow of ordinary tides and the force of ordinary storms:—*Held*, affirming the decision of the Court of Appeal (14 Q. B. D. 561), and following *Keighley's Case* (10 Rep. 139) and *Rex v. Commissioners of Sewers for Somerset* (8 T. R. 312), that in the absence of evidence that the prescriptive liability of the frontagers extended to the repair of damage caused by extraordinary violence of the sea, the liability to repair the damage thus caused to the wall fell not upon A. but upon the whole of the level.—The presentment of a jury at a court of sewers in 1861 found that the then owner of A.'s land was bound by reason of his tenure to repair a portion of the sea wall fronting the land so as to prevent the influx of the waters. In 1881–2 the commissioners of sewers made orders upon A. as the owner of the land to repair this portion of the wall, it having been destroyed by the aforesaid extraordinary storm and high tide. These orders were made "upon reading the presentment" of 1861. One of the commissioners who made the orders was personally interested as an owner of lands within the level:—*Held*, that the orders were bad and must be quashed: first, because, following *Reg.* v. *Warton* (2 B. & S. 718), *s.* 13 of 3 & 4 Will. 4 *c.* 22, which enables orders to be made upon a previous presentment does not authorize an order upon a person who has become owner of the land since the presentment; secondly, because the presentment being only of the ordinary liability did not justify an order to make good damage caused by an extraordinary storm.—*Held*, also, that if the commissioners had made the orders under the powers of sect. 33 of the Land Drainage Act 1861 (24 & 25 Vict. c. 133) they must themselves have found as a fact A.'s liability; that if they had exercised such a jurisdiction they would have been acting judicially, and that in that case the orders would have been invalidated by the fact that one of the commissioners was disqualified by reason of interest. Commissioners of Sewers for Fobbing *v.* The Queen - - - - - - - 449

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SET-OFF—Compensation—Land injured by railway company - - - 208
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SHIP—*Admiralty—Necessaries supplied to Foreign Vessel in English Port—Material Man—Jurisdiction of Admiralty Court—Foreign Vessel—Maritime Lien—Action in rem*—3 & 4 *Vict. c.* 65, *s.* 6—24 *Vict. c.* 10, *s.* 5.] The stat. 3 & 4 Vict. c. 65 s. 6 does not give a maritime lien in respect of necessaries supplied to a foreign ship in an English port.—The plaintiffs advanced to the part-owner of a foreign ship then at Liverpool money for necessaries for the ship. The part-owner having sold his interest in the ship to the defendants the plaintiffs brought an action in rem for the amount of the advances:—*Held*, affirming the decision of the Court of Appeal (10 P. D. 44), that the action could not be maintained. Northcote *v.* Owners of the Henrich Björn - - - 270

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SOUTH AUSTRALIA, LAW OF—*South Australian Registration Act*, 5 *Vict., No.* 8, *s.* 3—*Priorities—Registered Title affected by a prior unwritten Equity.*] *Held*, that under Registration Act, 5 Vict., No. 8, s. 3, a prior document of a registrable nature unregistered cannot convey a good title against a subsequent document of a registrable nature registered; but there is nothing in the Act to exclude a claim upon an unwritten equity, of which the subsequent registered purchaser has notice. White *v.* Neaylon - 171

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TRESPASS—*Actio personalis moritur cum personâ—Benefit received by Trespasser—Practice—Appellate Jurisdiction Act*, 1876: *Standing Order I.*] The decision in *Phillips* v. *Homfray* (24 Ch. D. 439) affirmed on the ground that the appeal was out of time. Phillips *v.* Fothergill - 466

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VICTORIA, LAW OF—*Victorian Lands Compensation Statute*, 1869, *No.* 344, *sect.* 35—*Construction—Compensation—Set-off.*] *Held*, according to the true construction of the 35th section of the "Victorian Lands Compensation Statute, 1869," that in assessing under the Act compensation for land compulsorily taken for a railway, the enhancement in value of the owner's adjoining lands may be set off against the amount allowed for damage thereto arising from such compulsory taking or severance; but may not be allowed against the compensation for the land actually taken.—Such "enhancement in value" includes that which arises from the use as well as the construction of the railway. Harding *v.* Board of Land and Works - - - - 208

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WATERWORKS COMPANY—*Water, Supply of pure and wholesome—Water pure and wholesome in Mains, but contaminated in Consumer's Pipes—Waterworks Clauses Act* 1847 (10 & 11 *Vict. c.* 17) *s.* 35—*Waterworks Clauses Act* 1863 (26 & 27 *Vict. c.* 93) *s.* 19.] Undertakers for the supply of water to Huddersfield were bound on certain conditions to cause pipes to be laid down and water to be brought to every part of the town, and by s. 35 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), "to provide and keep in the pipes to be laid down by them a supply of pure and wholesome water, sufficient for the domestic use of all the inhabitants of the town who should be entitled to demand a supply and should be willing to pay water-rate for the same." By their special Act the undertakers were empowered to make bye-laws with regard to the consumers' pipes. The bye-laws made under this power prescribed lead as the necessary material for every consumer's pipe, "not being of cast iron." The undertakers in accordance with their usual practice at the consumer's request and cost laid down communication and service pipes of lead between their mains and the plaintiff's house.—The effect of

WATERWORKS COMPANY—*continued.*
the bye-laws and of s. 19 of the Waterworks Clauses Act 1863 (26 & 27 Vict. c. 93) was that though the lead pipes might be the property of the plaintiff they were entirely under the control of the undertakers, and could not without their consent be interfered with by the plaintiff. Water was supplied by them to the plaintiff which was pure and wholesome in the mains but was of such quality that in its passage from the mains to the plaintiff's house it became contaminated by the lead and poisoned the plaintiff. The plaintiff having brought an action against the undertakers for damages for the injury to his health alleged a breach of the statutory obligation:—*Held*, that the obligation imposed by s. 35 was to supply water which was pure and wholesome in the mains, and by Lords Blackburn, Bramwell, FitzGerald, Halsbury and Ashbourne (The Earl of Selborne and Lord Watson dissenting), that having complied with that obligation the undertakers were not (negligence being out of the case) liable to the plaintiff in this action.—*Held*, by The Earl of Selborne and Lord Watson, that the undertakers were liable, on the ground that the water contained some special and peculiar solvent of lead, which made it poisonous after passing through the leaden pipes, although it would have been harmless if it could have been drunk direct from the mains.—The decision of the Court of Appeal (12 Q. B. D. 443) affirmed. Milnes *v.* Mayor, &c., of Huddersfield - 511

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